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AUTHOR McMahon, JoAnn Aaby
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ABSTRACT

This thesis examines the influence of tensions between collectivism and pluralism on constrictions and extensions of the legal concept of equality of educational opportunity in public education since the Brown v. Board of Education decision of 1954. The effects of collectivistic and pluralistic forces at the federal, state and district levels are considered, and the legal interpretations of various educational policy measures are discussed in examples of major court cases. The first two chapters are devoted to a review of the related literature and an explanation of the theoretical framework for the problem of educational inequality. Chapters three and four discuss the legal definition of equality and the issues affecting educational equity in various contexts. Chapter five includes summary tables of the requests for educational equality made by the pluralistic interests treated in this study. An extensive bibliography is appended. (JCD)

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THE TENSION BETWEEN COLLECTIVISM AND PLURALISM ON THE LEGAL CONCEPT OF EQUALITY OF EDUCATIONAL OPPORTUNITY

(PLURALISM AND THE PLEA FOR EDUCATIONAL EQUALITY)

A THESIS
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL
OF THE UNIVERSITY OF MINNESOTA

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JoAnn Abby McMahon

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
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CHAPTER I

REVIEW OF RELATED LITERATURE

Range of Definitions of Equality of Educational Opportunity

The concept of the right to equality of educational opportunity and the term itself have enjoyed a close relationship to law since the *Brown* decision in 1954.[1] Chief Justice Warren in delivering the opinion used two sentences containing the words from which the term appears to derive in its now famous form.

> In these days, it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an *education*. Such an opportunity, where the state has undertaken to provide it, is a *right* which must be made available to all on *equal* terms.[2]

This is Chief Justice Warren's elaboration of the phrase in the Fourteenth Amendment stating "nor shall any state . . . deny to any person within its jurisdiction equal protection of the laws."[3] His elaboration for the first time ties the principle contained therein to the basic unconstitutionality of racial segregation. That "all" are entitled to the "right" on "equal terms" blasts the "separate but

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[1] Brown v. Board of Education, (1) 347 U.S. 483 (1954).

[2] *Id.* at 494.

[3] U.S. Constitution, Amend. XIV, Sec. 2.

equal"[4] principle that satisfied the "equal protection of the laws" clause before *Brown*. The term, equality of educational opportunity, despite the pervasiveness of its present use, cannot be found in a popular *Law Dictionary*--nor is it mentioned under the listing of "equal protection of the laws."[5] The term, then, is more accurately to be considered an interpretation of a legal term, than a legal term itself.

The first body of litigation growing out of *Brown* came almost ten years after the famous decision. This was desegregation litigation focused primarily in the South. Although the *Brown* court denounces "segregation solely on the basis of race" because it constitutes a denial of "equal educational opportunities,"[6] segregation could be legally outlawed only when it resulted from state laws that prescribed it--*de jure* segregation.[7] Litigation, not coincidentally, multiplied after federal Civil Rights laws enacted in 1964 provided assistance for complainants and also for districts attempting to integrate. Conversely, the government threatened districts with withdrawal of federal funding for noncompliance. Later, desegregation litigation surfaced in the urban North, where segregation had not been legislated, but began to be questioned because segregation itself was now being

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[4]Plessy v. Ferguson, 163 U.S. 537 (1896).

[5]Steven H. Gifis, Law Dictionary (Woodbury, New York: Barron's Education Series, Inc., 1975).

[6]Brown v. Board of Education at 494.

[7]*See* note 5 *supra* at 56.

viewed as unfair and also because the state had either condoned or facilitated the segregated conditions. At the same time questions other than race began to assault the concept of equality of educational opportunity. If education could not be denied because of race, could it then be denied because of sex, marriage, the inability to speak English, a low socioeconomic status, the financial disparities between local school districts, or because of physical, mental or emotional handicaps?

Answers to all these equality of opportunity questions have been generated through a myriad of definitions. However, two generalizations can be made: 1) Despite the humanitarian and ethical arguments presented in the literature, legal extensions of the concept are often demanded by a group or writer seeking relief for one particular brand of inequality. 2) Ethical and financial arguments against the extension of the concept are rare in the literature. They are typically advanced by the lawyers of the defendant school district during the actual litigation proceedings: few scholars seem to take their side in the educational, sociological, or law reviews.

Arthur Wise is representative of a rather vociferous group whose main concern is financial equity--that is, the equalizing of disparities in funding per student between districts within a state.[8]

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[8] *See generally*, Wise and Levin: Arthur E. Wise, Rich Schools, Poor Schools (Chicago: University of Chicago Press, 1968). A good representation of the views of this group can be found in Betsy Levin (ed.), Future Directions for School Finance Reform (Lexington, Mass.: Lexington Books, 1974) which has articles by Betsy Levin, John E. Coons, Stephan Michelson, W. Norton Grubb, P. Michael Timpane, Stephen D. Sugerman, Peter D. Roos and others.

Originally, this zeal did not extend to equalizing funding disparities between states, an ideological flaw perhaps exacerbated by the spectre of a Washington bureaucracy attempting to run the nation's schools. However, the commitment of this group to funding equity within the state is typically tied to a twin goal--the dismantling of the "present system of school financing," *i.e.*, the local property tax. Further, Wise, in his definitive work, *Rich Schools, Poor Schools*, has elaborated a total of nine definitions of equality of educational opportunity collected from recognized scholars in the field; these definitions share a common concern for financial definition:

The Negative Definition[9]

The Full-Opportunity Definition[10]

The Foundation Definition[11]

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[9]Wise, *supra* at 147. For the negative definition Wise cites Charles S. Benson, The Cheerful Prospect: A Statement on the Future of Public Education (Boston: Houghton Miflin Co., 1965), at 66-67. (Equality of education opportunity) implies that any two children of the same abilities shall receive equivalent forms of assistance in developing those abilities, wherever they live in a given state and whatever their parental circumstances are.

[10]Wise, *supra* note 8 at 148. For the full-opportunity definition Wise cites John W. Gardner, Excellence: Can We Be Equal and Excellent Too? (New York: Harper and Row, 196.), at 74-75.

Our kind of society demands the maximum development of individual potentialities at every level of ability.

The goal of the American educational system is to enable every youngster to fulfill his potentialities, regardless of his race, creed, social standing or economic position.

The traditional democratic invitation to each individual to achieve the best that is in him requires that we provide each youngster with the particular kind of education which will benefit him.

[11]Wise, *supra* note 8 at 149. The foundation definition Wise states is one currently used:

The majority of states currently employ a variation of what has been called the foundation definition of equality of educational

The Minimum-Attainment Definition[12]

The Leveling Definition[13]

The Competition Definition[14]

The Equal-Dollars-Per-Pupil Definition[15]

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opportunity. The traditional foundation program stipulates a satisfactory minimum offering, expressed in dollars to be spent, which shall be guaranteed to every pupil. Such a program ensures every child equal educational opportunity to a prescribed minimum. When a locality cannot supply that minimum offering at the state-mandated tax rate, the state makes up the deficiency.

[12]Wise, *supra* note 8 at 151. For the minimum attainment definition Wise cites Benson, *supra* note 9 at 112-113. Programs designed to provide approximate "equality of attainment" in the early primary grades are not utopian. If all normal children can be helped to achieve a standard of competence in reading by the age of 8 or 9 that is at present achieved by the average third-grader in a representative elementary school, the country will have taken a giant step toward reducing the incidence of functional illiteracy.

[13]Wise, *supra* note 8 at 152: The leveling definition of equality of educational opportunity asserts that resources should be allocated in inverse proportion to students' ability. This definition is based on the assumption that students should, as nearly as possible, leave school with an equal chance of success. Because some students are more able than others, and/or come from home backgrounds which facilitate their education, the schools should attempt to diminish these differences by concentrating on the less-advantaged students.

[14]Wise, *supra* note 8 at 153: The competition definition of equality of educational opportunity, assumes that students have different capacities to profit from instruction and asserts that educational resources should be allocated in direct proportion to students' ability. The equality demanded by this definition is equality in the competition for access to educational resources. The more able a student, the greater should be his access to society's scarce educational resources.

[15]Wise, *supra* note 8 at 155: The equal-dollars-per-pupil definition views education opportunity as a grant by society to the individual, and assumes that there is no reason for society to grant more to one individual than to another. Under this view, society is obliged to grant an equal amount of its scarce educational resources, as measured in dollars, to the education of every individual--which resources and how they are used varies, of course, with the needs of the individual.

The Maximum-Variance-Ration Definition[16]

The Classification Definition[17]

Wise contends that the Supreme Court will employ the negative definition based on the *Brown* precedent. "Negroes cannot receive different treatment from the state because of their race."[18]

Another group representing the genre that equates educational equality with financial equality takes a much more objective view. Russell Harrison is concerned about wise selection of policies "in the battle against expenditure inequality and fiscal imbalance among public school systems."[19] He contends that, "The current answers . . . are based on speculation, more than qualitative evidence. Evidence is based on . . . a few states, or a comparison of only a few policies." Most reports amount to little more than "subjective estimates of the best solution" ignoring effectiveness of other possible solutions, and

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[16]Wise, *supra* note 8 at 156: Depending on the method of financing, implementing the equal-dollars-per-pupil formulation might necessitate the reallocation of a large percentage of current educational expenditure. Its implementation could interfere with the educational programs in high-expenditure school districts unless the equalized level were set at the level of the high-expenditure districts.

[17]Wise, *supra* note 8 at 157: The classification definition requires first the specification of suitable educational programs for students of specified characteristics. It then requires that each program be made available to every student with the corresponding set of characteristics wherever he lives in the state. The classification definition thus specifies that there is to be equality for all within a classification.

[18]*Id.* at 158.

[19]Russell S. Harrison, Equality in Public School Finance: Validated Policies for Public School Finance Reform (Lexington, Mass.: Lexington Books, 1976) at XIII.

the empirical side effects of each."[20] His inductive study addresses itself to the weaknesses he notes in research in this genre. Robert D. Reischauer and Robert W. Hartman have taken the level-headed stance Harrison advocates, objectively discussing the fiscal dilemma, possible reforms, the inherent threats of the reforms to local control, and the roadblocks such threats create.[21]

Much of the recent literature advocating "fiscal neutrality"[22] or other reformative policies have recently started to address state constitutions since the Supreme Court in *Rodriguez* refused to meddle in the explosive arena of state delegated local financing practices.[23] *Robinson v. Cahill* is such a case where the state constitution was found to be violated; pre-*Rodriguez* cases such as *Serrano v. Priest* and *Van Dusartz v. Hatfield* must be distinguished because although they were litigated in state level courts, they found state endorsed school financing practices to violate the U.S. Constitution.[24] Other

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[20] *Id.*

[21] Robert D. Reischauer and Robert W. Hartman, Reforming School Finance (Washington D.C.: The Brookings Institution, 1973) at 55-57.

[22] Fiscal neutrality is a standard proposed by John Coons, William Clure, and Stephen Sugarman in connection with Serrano v. Priest, 5 C3d 584, 487 P2d 1241, 46 Cal. Rptr. 601, in California in 1971. This standard stipulates that "courts reject existing financing schemes as arbitrary and unfair, leaving the states free to adopt any of a variety of alternative funding arrangements consistent with its negative command," according to David L. Kirp and Mark G. Yudof, Education Policy and the Law (Berkely, California: McCutchan Corporation, 1974), at 582.

[23] *See* Levin note 8 *supra*. Individual articles appear in her book on strategies pursued in New Jersey, California, Michigan, Washington and Texas.

[24] Robinson v. Cahill, 62 NJ 473, 303 A2d 273 (1973), Serrano v. Priest, 5 C3d 584, 487 P2d 1241, 96 Cal. Rptr. 601 (1971) and Van Dusartz

financing reforms have been initiated by legislatures. Frank W. Lutz and David J. Edgren examine *Pennsylvania's Act 125*; they charge that their state funds equalized educational resources by giving some taxpayers the option of lowering their property taxes or raising the salaries of the same teachers they had when resources were unequal.[25]

Related to the funding inequalities is controversy over defining equality by inputs or outputs. At first, attacks on funding disparities were supported by evidence that more dollars were being spent (usually on an advantaged child) per pupil in one district than in another (a disadvantaged child).[26] In fact, this was one facet of *Brown*. "Separate but equal" arrangements for Blacks were usually unequal in dollars spent and academically inadequate.[27] One researcher who studied the effect of busing on achievement concluded:

> Integrated schools *per se* are not the real issue; if schools in the Black community provided education of the same quality as those in White communities, Blacks would not be so interested in busing programs. In fact, when we asked students in the METCO program this question, almost 75 percent said they would prefer to attend their own community school if it were as good as the suburban schools.[28]

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v. Hatfield, 334 F Supp 870 (D Minn. 1971). In the New Jersey Robinson v. Cahill case, plaintiffs contended the state constitution guaranteed a "thorough and efficient" education for each student.

[25] Frank W. Lutz and David J. Edgren, *School Finance: A Critical Look at Pennsylvania's Act 125*, 5 J. L. & Educ. 3 (1976), 317 at 320.

[26] Wise, *see* note 8 *supra*.

[27] Kirp and Yudof, note 22 *supra* at 369.

[28] *Id.* at 375.

The definition of racial inequality centered around the insult to Blacks that segregation implies[29] is both separate from, and related to, the definition by reason of inputs. The separation theme has inevitably led to another definition, also tenuously related--that of outputs or needs. Much of the more recent literature reflects James L. Jarrett's view that, "The concept of equality of educational opportunity" needs revision because the term "opportunity" has about it the conservative ring of passivity."[30] "As the ideal of educational opportunity is extended," he contends, "there will be a turning away from equality of input to equality of output."[31] The rationale for this belief is that disadvantaged (often minority) pupils come from homes that are not "strongly and effectively supportive of education," and thus do not reap the same benefits from education as their more fortunate peers.[32] Therefore, advocates of output measures favor compensatory programs to help bring such pupils to levels where learning can more effectively take place or they favor programs of intervention that interrupt the socioeconomic factor inhibiting education.[33] One such intervention proposed is to train poverty mothers in infant and

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[29]Ronald Dworkin, *Social Sciences and Constitutional Rights*, 6 J. L. and Educ. 1 (1977), 3.

[30]Sterling M. McMurrin, *The Meanings of Equality*, The Conditions for Educational Equality, (Lexington, Mass.: Heath Lexington Books, 1971), at 24.

[31]*Id.* at 27.

[32]James S. Coleman, *Increasing Educational Opportunity: Research Problems and Results*, at 22 in McMurrin volume, note 30 *supra*. Notes 33 and 34 *infra* also refer to the McMurrin volume.

[33]Jerome S. Bruner, *Poverty and Childhood* and Coleman *supra*. In these areas E.S.E.A. has had more influence than the courts.

child care techniques that will produce better "pupil material."[34] Language ability has, interestingly enough, become a facet in the quest for equality; compensatory programs have figured importantly in the process. The Supreme Court felt Chinese students unable to speak the language in which lessons are conducted were victims of functional exclusion.[35] As a result, English as a Second Language and Bilingual programs have sprung up.[36] In fact, recent research shows that poverty and ghetto children often speak a brand of English that inhibits progress in school. Robert Dreeben calls it public language and Jerome Bruner calls it concrete; both contend that this language reflects a thinking process in which it is impossible to generalize.[37]

However, another group emerged that insisted that if children had a right to a free public education regardless of race, then all children had a right to free public education regardless of other handicaps that rendered them exceptional. Since the emphasis for the handicapped, like racial integration, was on the benefits of being part of the mainstream, compensatory programs fitting both student and

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[34] Bruner, *supra* at 60.

[35] Lau v. Nichols, 412 U.S. 938 (1973).

[36] Bilingual instruction is considered more effective in correcting fundamental exclusion caused by inability in English. Tyl Van Geel, *The Right to be Taught Standard English: Exploring the Implications of Law v. Nichols for Black Americans*, 25 Syracuse L. Rev. (1974), 867.

[37] Robert Dreeben, On What Is Learned in School (Reading, Mass.: Addison Wesley Co., 1968) at 54 and Bruner, note 33 *supra* at 54.

facilities for mainstreaming became necessary.[38] Ironically, new demands for equality in direct opposition to the mainstream idea are also being pressed by groups demanding the freedom to retain their values and culture and want that freedom implemented by free public education.[39] Research, too, suggests that change in curriculum content in urban schools is needed to reflect pluralism and local bias.[40] Successful equality requests for racial minorities also prompted a white majority group to ask for a stop to discrimination and special treatment in all phases of life, and also to begin to assert its rights. Although this group--women--went to court for the right to tend bar, administer estates, and work while pregnant, no major public education cases have surfaced. Complaints litigated have dealt with lack of access to peripherals such as athletic teams. This situation, according to Mark Yudof, may be explained by the relative success girls have experienced in the schools' regular programs and a tendency for many women to desire to have nothing changed.[41] Legislation, rather than litigation, has largely been responsible for extensions of educational opportunity for both the handicapped and girls.[42]

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[38]Thomas K. Gilhool, *Education: An Inalienable Right*, Exceptional Children, May, 1973 at 597.

[39]Clark S. Knowlton, *The Special Education Problems of the Mexican Americans*, in McMurrin, note 30 *supra* at 142.

[40]Larry L. Leslie and Ronald C. Bigelow, *Relevance and Self-Image in the Urban School* in McMurrin, note 30 *supra* at 142.

[41]Kirp and Yudof, note 22 *supra* at 495.

[42]Martha M. McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Reform?*, 5 J. L. and Educ. 2 (1977), 159 at

Definition of Education

The survey above demonstrates the wide range of definitions that interest groups, commentators, courts, Congress and state legislators have applied to the term "equality of educational opportunity" since the constitutional swelling of the term in *Brown* in 1954. Most of these definitions express an explicit concern with demands for the "equality" and "opportunity" elements of the term, while dealing with the "education" factor of the term more implicitly. However, when the Constitution, federal laws, or statutes are employed to guarantee equality of educational opportunity, it is critical that the role and nature of education itself be understood. Sixty years ago Emile Durkheim made a comprehensive definition of education as it exists in modern industrialized society,

> We come, then, to the following formula: "Education is the influence exercised by adult generations on those that are not yet ready for social life. Its object is to arouse and to develop in the child a certain number of physical, intellectual and moral states which are demanded of him by both the political society as a whole, and the special milieu for which he is specifically destined."[43]

In this tradition Talcott Parsons also delineates the twin collectivistic purposes of education of inculcating common basic academic skills and socializing in common values to make society cohesive, in recognition of the pluralistic diversity inherent in a large democratic, and industrialized society. He has detailed the steps

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171 - 176 on Title IX of the Educational Amendments of 1972 and (Public Law 94 - 142) Education for All Handicapped Children Act of 1975, Sec. 612.

[43]Emile Durkheim, Education and Sociology (New York: The Free Press, 1956) at 71.

by which the American classroom functions as the main agency responsible for both the socialization and the cognitive/non-cognitive channelling necessary before children can assume their full adult roles.[44] Robert Dreeben underscores the collective role of the schools in industrialized society with the classroom as his focal point; he demonstrates that regardless of the nature of the instruction--which he says is only one component of the total outcome--schools serve the indispensible function of providing "normative outcomes that emerge through pupils' experiences in coping with the sequence of situations whose character is defined by the structural properties of the schools."[45]

Indeed, Parsons--in discussing the viability of democracy itself--contends that the distinction of maintaining a center between the radical left and the radical right "has made workable what the Western world understands as democracy," in order that internal conflicts can be modulated. "Thus, political democracy is bound up with structural pluralism in the society 'which' in turn implies that both plural economic interests and interests grounded in other bases, locality, religion, and ethnicity--and indeed social class itself--can be integrated into a system of order not inherently repressive or exploitative."[46] He clarifies the role of education in a democratic

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[44]Talcott Parsons, *The School Class as a Social System: Some of Its Functions in American Society*, 29 Harvard Educ. Rev. 4 (1959), 297.

[45]Dreeben, *supra* at 54.

[46]Talcott Parsons and Gerald M. Platt, The American University (Cambridge, Mass.: Harvard University Press, 1973) at 290.

milieu by noting its "commitment to basic rights of pluralistic membership or universalistic standards."[47]

These definitions of the majoritarian concerns of education as allowing for, or depending on, the pluralistic autonomy inherent in its structure are refuted by William Greenbaum who claims the "Protestant Anglo-American ideal of assimilation has failed" and that we should "adopt policies that support diversity" and "support pluralistic institutions" as a new ideal "to direct the socialization process."[48] Even in his charges, however, he underlines the importance of commonly agreed upon goals of inculcating basic skills and values, but disagrees primarily as to what these ought to be. He is indeed successful in pointing out the growing lack of consensus for the present ideal, but fails to show how his "pluralistic" ideal could have the necessary strength to weld together admittedly fragmented groups to the point of common sets of goals and values for education.

Dispersement of Literature

A review of the literature related to the concept of equality of educational opportunity exposes two types of problems that inhibit the arrival at a realistic appraisal of the present meaning of the term. First the literature is dispersed in many ways: Most of the information on the subject is located in law reviews, books on law, and records of court cases themselves. Other interpretations in book and

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[47] Parsons and Platt, *supra* at 210.

[48] William Greenbaum, *America in Search of a New Ideal: An Essay on the Rise of Pluralism*, 44 Harvard Educ. Rev. (1974), 441.

periodical form on equality of educational opportunity appear in libraries housing works of two other professional groups with an intimate interest in the term--educators and social scientists.

To add to the difficulty of the broad dispersement and specialized nature of the materials, literature on the concept of equality of educational opportunity cannot usually be located in one piece. Quite often only one particular type of demand for access to educational opportunity will be discussed in an article. Several authors may take this particular subject as their theme, offering a variety of interpretations. Conversely, an allusion to only one aspect of this particular subject might appear in various articles because it utilizes a common principle of law demonstrated in this and other cases of a non-educational nature. An example of this is a case involving a woman's right to education appearing in an article discussing the legal right of a woman to be a bartender.[49] Both, or either, of these cases could be discussed in an article cataloging a large body of women's rights cases. Another typical source for the concept of equality of educational opportunity literature is the article discussing many laws affecting education--particularly all those that have provoked the most sweeping changes in the management of educational institutions--thus, the seeker of information on the equality concept will have to sift through due process and First Amendment rights

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[49]Betsy Levin, *Woman's Place in the Constitution: The Supreme Court and Gender Discrimination*, High School Journal, October 1975 at 31. Bardwell v. Illinois, 83 U.S. 130 (1873), the right to attend law school, and Goesart v. Cleary, 335 U.S. 464 (1948), the right to tend bar.

of students to get at the chosen focus. Locating and reading the cases is usually productive, but those in which the decision turned on access to education as a right to "equal protection under the laws" will not be catalogued together for the information seeker's convenience. All "equal protection" cases are certainly not concerned with the equality of educational opportunity, and some equality of educational opportunity cases do not turn on that particular clause.[50]

Subjectivity of Arguments in Literature

In addition to the widely dispersed and fragmented nature of the literature, there is a second type of problem that hinders organizing the literature into a usable body. This problem stems from the assortment of foci interpreters of the term have selected. Such writers are often writing and researching not so much in an effort to reveal what the present interpretation is, but are instead arguing for what the present interpretation should be. As a group these writers are usually arguing for extension of interpretation of the term in the particular area where their own interests lie. In the area of extending district funding equality Arthur Wise is archetypical. He announces in the dust jacket of *Rich Schools, Poor Schools*, "I was impelled in this endeavor by the belief that there is no justification--constitutional or otherwise--for permitting the circumstances of

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[50] See McCarthy, note 8 *supra* at 177 where Lau v. Nichols was found to violate the Civil Rights Act of 1964, not the equal protection clause of the Constitution.

parental wealth and geography to determine the quality of a child's education in the public schools of a state."[51]

In the preface, he readily admits the subjective nature of his work, which was originally prepared as a doctoral dissertation: "The reader should recognize my egalitarian bias and should be aware that I am motivated by a desire for some improvement in the present situation."[52] Other "reformers"--as they refer to themselves in school finance equality--are not less subjective. Betsy Levin, a lawyer, has edited a book in which twelve of the outstanding proponents of fiscal equality--and opponents of the present measure of equality provided by local control--deplore the setbacks leveled by the Supreme Court in *Rodriguez*, the erosion of the cost-quality issue by recent research, and the weaknesses surfacing in the proposed panacea of fiscal neutrality.[53] The experts detail in their articles past victories and defeats in the war against unequal financing, and, more important, new strategies to bring equality of educational opportunity to fruition through school finance reform. Levin's use of expressions like: "first real victory," the "funeral" of fiscal neutrality, "the cost-quality issue has been severely shaken," "recalcitrant state legislatures" "euphoria has subsided" to discuss expectations of increased state and federal funding are summed up in her statement near the end of her preface stating, "*Rodriquez* may have temporarily slowed this reform movement,"

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[51] Wise, note 8 *supra* (dustjacket).

[52] *Id.* at XIII.

[53] Levin, note 8 *supra* at IX-X.

but one can conclude from these articles, "that the principal effect of the decision was merely to change its direction."[54] John E. Coons--an innovator in district power equalizing, one method of producing fiscal neutrality--opens the symposium with the following statement as a preface to his article, "Fiscal Neutrality After *Rodriguez*": "It was sporting of the editor to entrust this informal introduction to a frustrated assassin of the present school finance system. Such *beau geste* merits a special effort at objectivity. Regretably, the present performance does not discharge that obligation."[55] Peter D. Ross, in an article that follows, assails *Rodriguez* as a defeat for "those who would seek to reform the schools through litigation."[56] He knows his opponents fear the leveling down, the state imposed uniformity, and erosion of parental autonomy and don't view funding equalization as a "reform." In fact, Stephan Mickelson, another proponent of funding equalization admits, "School finance debates must inevitably resolve themselves into political differences about concepts of justice." He goes on to explain that since he has no children in school (apparently, he thinks if he did, they would be in a well-funded school that would not be adversely affected) it is easier for him to advocate equalization.[57] This amounts to a somewhat

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[54] *Id.* at XI.

[55] Coons, in Levin, note 8 *supra* at 1.

[56] Roos, in Levin, note 8 *supra* at 283.

[57] Michelson, in Levin note 8 *supra* at 160.

strange interpretation of what an abstract concept of justice would ideally consist of.

It is interesting to note also, that another matter of a personal nature may influence his and Ross' concept of justice; he is employed as Senior Economist, Center for Community Economic Development, Cambridge, Massachusetts, while Ross--Staff Attorney, Center for Law and Education there--has been active in litigation involving handicapped students.[58] Russell Harrison, who apparently does not have such an axe to grind, expresses concerns about lack of objectivity in a book in which he does provide validated policies for public school finance reform. He claims that much research has documented the existence of inequalities, but the solutions offered "are based on speculation," "identify only the subjective estimate of the best solution," and that "little empirical research has been directed to the critical issue" of documenting "proof on the relative effectiveness of each policy."[59] Despite the fact that funding reformers proudly admit their ideological bias, the existence of this slanted perspective and even their assurance that the school lives of their own cohort will not be affected by their policies, they leave much to be desired in scientific objectivity in this genre of finance research. Thus getting at a realistic definition of equality of educational opportunity through this genre is difficult.

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[58] *See* Michelson at 138 and Roos at 268 in Levin note 8 *supra*.

[59] Harrison, note 19 *supra* at XIII.

Poverty and Equality

Another large body of literature focusing on money does not even have educational equality as its goal; instead it concerns itself with the eradication of poverty and uses standards set in educational equality through integration, compensatory education, and mainstreaming as a means to that end. Some direct quotations from Edmund Gordon focus directly on the questionable motivation of this type of literature. "If the products of serious research were as well represented in this effort as the good intentions, the enthusiasm, the bandwagon hopping and the grant hunting, we could be more hopeful that meaningful solutions could be found to the problems of the disadvantaged."[60] He is personally ashamed, he says, of this record.

> Twenty years ago I began professionally to try to do something about changing the life chances of the children of the poor. . . . my life circumstances have greatly improved--largely as a result of the fact that helping the poor has become such a respectable professional and research pursuit. Yet the life chances of the people we are supposed to be helping have changed very little . . . despite cumulative appropriations of $30 billion and misdirected effort and equivocal research.

success in school depends on membership in the white middle class.[61] Further complicating this situation is the tendency for the researcher to have "strong viewpoints" about what proper policy should be in advance of his research, according to Henry M. Levin--himself an

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[60] Edmund Gordon, *Education of the Disadvantaged: A Problem of Human Diversity*, Education, Inequality, and National Policy, ed. Nelson F. Ashline, Thomas R. Pezzulo, Charles I. Norris (Lexington, Mass.: Lexington Books, 1976), at 102.

[61] *Id.* at 101.

authority on the poverty issue. The agencies that pay for research, are also culpable, he asserts, since they are "just as likely to select a researcher on the basis of his values as on his 'scientific' competence."[62] Indeed, Arthur Jensen's conclusions regarding Black genetics and IQ, were regarded as "heresy in the liberal academe with its environmental orthodoxy" according to Charles I. Norris in his editorial preface to an anthology on poverty and inequality. The fact that his book contains an article in which Jensen shifts "his emphasis from group to individual differences" as a focus for intervention is probably a manifestation of the lack of remuneration--and even audience--for unpopular research in the powerful liberal academic citadels.[63] Their objectivity comes to the fore when these citadels risk, however, losing endowments by inviting someone of the intellectual stature of Jane Fonda to rail against the major benefactor of the college in the name of free speech and academic freedom.[64] Nelson Ashline gives another reason for the failure of research to produce concrete policies. He maintains that "academics tend best to communicate to other academics," and that a failure of theirs to be "emotional rather than rational" renders them somewhat ineffectual as attracting consumers who are policy formulators or implementers."[65]

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[62]Henry M. Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence* at 87 in Ashline volume, note 60 *supra*.

[63]Norris, *Introduction* at XVIII, note 60 *supra*. *See* Gordon, note 61 *supra* and Levin, note 62 *supra* for evidence of this conclusion by the author.

[64]St. Paul Pionneer Press, November 22, 1977.

[65]Ashline, *Foreward* at XII, note 60 *supra*.

Hubert Gans underlines this with a controversial comment at a conference dealing with eradication of poverty through education. In it, he stated that he is dubious about the ability of education as a force in achieving either an antipoverty policy or equality in society, and that furthermore poor children "are not half as interested in learning as educators like to believe."[66] In a review of literature on equality of educational opportunity the latter part of that statement is indeed a rare gem. Other sociologists, Robinhoods no doubt far removed from the realities of the typical classroom, would seek to get more money by any means to buy better teachers and facilities, and more materials and years of school. They labor on the presumption that poor children in the ghetto and in the school district with a low tax base are all driven by an insatiable hunger for education.

Realistic statements like Gans' about the desire to learn are rare; neither emotionalnor rational arguments to constrict the concept of equality of educational opportunity are manifest in the form of scholarly articles or symposia. Such arguments are advanced by defense lawyers for school boards or else by judges in their written opinion. As the foregoing review of the literature indicates, arriving at an accurate, yet comprehensive, interpretation of the present concept of equality of educational opportunity--given the lack of both objectivity and realism the literature provides--is at best difficult. Other problems with the literature--of its location and its obscurity--have been noted earlier. However, a method of dealing with the material on

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[66]Herbert J. Gans, *The Role of Education in the Escape from Poverty*, at 61-62 in Ashline volume, note 60 *supra*.

equality that successfully removes itself from the influence of such conditions is crucial if the interpretation is to be useful.

Other Arguments: Analogy and Suspect Classification

Some literature on extending the concept of equality of educational opportunity actually does reveal attempts to justify such extension by more respectable means than idealogical bias or self-survival. An example is Wise's argument for extending educational opportunity in funding reform by use of an analogy between "permitting circumstances of parental wealth and geography to determine the quality of a child's education" and discriminatory classification because of race, voting apportionment, and indigence (the latter in the case of providing defense for criminals). Although analogy is often a successful strategy in argumentation, this one fails because it doesn't hold up under close inspection. Wise does not actually refer to parental wealth but rather to the district tax base; the court's remedy for overcoming indigence in the criminal's case does not affect the daily life of the average citizen the way upheaval of local control would; and "one man, one vote" is not what Wise wants--his formula is more like "one rich child, one dollar, one poor child, two dollars."[67] In addition to the breakdown of this particular analogy the general analogy approach has a limitation in that no particular analogy would be applicable to the wide range of questions existing in the broad range

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[67] Wise, note 8 *supra*. Details of these will appear in Chapter IV, *infra*.

of literature covering discrimination in race, sex, language, and financing issues.

Another more representative type of argument proceeds from the base that new suspect classifications should be admitted. It avers that suspectness should be extended to cover disadvantaged pupils, alone, or along with advantaged students who live in a district with poor local effort and/or a low tax base. Betty Levin is a proponent of this view, as well as the view that women already meet suspect standards. If the Supreme Court eventually adopts her interpretation, a relatively small minority of the total U.S. population would remain in non-suspect status, since arguments for suspectness are usually accompanied by broader interpretations of "state action" and "fundamental rights," as well--other elements that invoke the strict scrutiny test for the purpose of destroying invidious classification.[68] And although the finding of an invidious classification decides many equality questions, there are some where this principle does not figure prominently in the decision.

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[68] *See generally* McCarthy, note 42 and Betsy Levin note 49 *supra*.

CHAPTER II

THEORETICAL FRAMEWORK

There is, however, a method of argument suitable for the equality issue suggested in statements made by other experts in the field of educational law. William Goldstein maintains the "pervasive issues" in the equality of educational opportunity controversy represent a "fundamental clash between values of nationalism and assimilation on the one hand, and pluralism and particularism on the other."[69] Mark Yudof maintains that questions of equal access to education involve "the sensitive issues of federalism and democracy" through the relationships of the "federal courts, Congress (H.E.W.) and the thousands of local school districts" that must implement the remedies.[70] The method these statements suggest is at once attractive because it does not exhibit the obvious limitations of either of the two preceding methods of analogy and suspectness. In addition, it allows arguments to be advanced for constricting--as well as extending--the concept of equality of educational opportunity. To use it, one need not take sides, but rather analyze what actually has taken place (or is now transpiring) rather than what should be. Besides offering objectivity,

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[69] Stephen R. Goldstein, Law and Public Education (New York: The Bobbs-Merrill Co., Inc., 1974) at

[70] Kirp and Yudof, note 22 *supra* at 281.

it provides an axis on which all types of equality of educational opportunity cases qan be informed, and no less important, provides a way for the diverse and diffuse subject matter to be successfully united and organized so a synthesis is possible.

In the introduction to a *Michigan Law Review* devoted entirely to "Education and the Law" the state is said to have two goals which are both of a collectivistic nature: "The development of the basic reading, writing, and other academic skills that any productive member of society must possess; and the inculcation of values deemed essential for a cohesive, harmonious, and law-abiding society."[71] It becomes clear that although the state is not committed to pluralistic concepts through the goals themselves, legal questions arise regarding the means of reaching the two collectivistic goals when pluralistic interests are asserted. Such pluralistic interests include groups or individuals seeking exemption from, or more access to, the states' stated goals of "inculcating community norms or minimum academic skills." The review maintains that general educational litigation is "predominantly a contest between educational decision-makers who purportedly represent the 'state's' interest and parents who seek either to shelter their children from socialization in the public schools or to gain access to that socialization experience." Since the focus of this project of the *Michigan Law Review* is all litigation relating to public education, it understandably explores only a limited number of landmark cases in the area of equality of educational

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[71] *Project, Education and the Law: State Interests and Individual Rights*, 74 Mich. L. Rev. 7, (June, 1976), at 1373.

opportunity, and then confines itself to major conflicts between collectivism and pluralism in each. And the ostensibly simple content between the "state" (collectivistic interests) and parents' (pluralistic interests) attempts to gain more access for their children actually represents quite a complex maze of motivations. Ironically, pluralistic groups often use arguments of collectivism to seek greater access to their collectivistic goals, while the state often asserts the supremacy of the pluralistic interest of parental input and local control if a careful inspection of equality disputes is made.[72]

Defining Legal Equality: Collectivism Pluralism Analysis

A pluralist-collectivist analysis appears to be critical if an understanding of the reasons for the final decisions in Constitutionality or legislation enactment is to be apprehended. Furthermore, the collectivistic or pluralistic impulse is also intimately tied to two courtroom factors that figure prominently in the granting or denial of the demand asserted in the name of equality of educational opportunity--strict scrutiny review and implications of the remedy. Finally, application of such an analysis can reveal the impotence of some laudable ideological arguments for equality of educational opportunity in questions of Constitutionality.

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[72] *Project, Education and the Law*, note 71 *supra* at 1382. It is useful to extend this type of analysis to elicit the collectivistic and pluralistic tensions in greater detail in the limited number of cases the article selects, and even more important, to extend and detail such analysis in other relevant cases and laws in the literature.

Statement of the Problem

There is a critical contemporary concern among both citizen groups and educators regarding the meaning of the concept of equality of educational opportunity. The present legal interpretation of the term has been clouded because of the preoccupation with questions of compliance to legal extension of the term rather than questions concerning the legal principles behind the remedies imposed. This misplaced emphasis is understandable, given the immediacy of the need for implementation and the intractable nature of interpreting the concept itself. The diversity, dispersement, and diffuseness of printed records of both litigation and statutes contribute to this condition. There is prolific literature on the subject intended to explain, but because of the variety of its foci--it serves instead to prevent a unified approach--and because of its subjectivity, actually hinders an objective and realistic interpretation.

The theoretical framework selected in this study to elicit the legal interpretation of the equality of educational opportunity accomplishes these things:

1. It serves to gather diverse empirical manifestations of the interpretation into a meaningful whole and thus offers a synthesis.
2. It provides for a synchronic analysis.
3. It provides for a historical analysis.
4. It reveals the motivation of requests for extension of the interpretation.
5. It reveals the motivation of requests to limit the interpretation.

6. It reveals the reason for the legal result (judicial and legislative) in a conflict between extension and limitation.

Problem

It is the purpose of this study to show the influence of the classic American pull between collectivistic and pluralistic forces on constrictions and extensions of the legal concept of equality of educational opportunity in public education since the *Brown* decision in 1954.

Definitions

Collectivism:

Collectivism describes the condition of individuals of a society acting together to secure common goals affecting or including the whole, and also the policy of favoring the preservation of such a condition. American public education has traditionally supported the twin collectivistic goals of the teaching of (1) values leading to effective citizenship and (2) basic skills in reading, writing, and numbers to perpetuate a common culture. The terms are used in *Project, Education and the Law: State Interests and Individual Rights, Michigan Law Review*, June, 1976.

Pluralism:

Pluralism refers to the existencewithin a society of groups distinctive in ethnic and racial origin, sex, ability, handicaps, cultural background, and membership in political sub-units. It may

alternately refer to the protecting of special interests or preserving the identity of such groups.

Delimitations

Two delimitations will be imposed upon this study.

1. As the Review of the Literature indicates, there is a general consensus that the present era of activity in application of the equality of educational opportunity began with *Brown v. Board of Education*, 347 U.S. 483 (1954). Arthur Wise is representative saying, "The concept of equality of educational opportunity, long a promise of American education, received renewed attention" as a result of the *Brown* decision. He goes on to credit the desegregation decision with providing "impetus to the struggle for equal rights for Negroes--in schools and elsewhere"and also with creating "a focus for judicial interpretations of equality in other spheres."[73] Indeed, every "sphere" examined in this study has no difficulty tracing its geneology back to *Brown*.

2. Because of the proliferation of litigation, legislation, and literature spawned by *Brown*, representative cases, statutes, and interpretation will be selected for analysis of areas a consensus of legal and educational experts recognize as the critical assaults on the interpretation of the concept of equality of educational opportunity. Listed in the Review of Literature, *supra*, these areas are questions of 1) intradistrict and interdistrict funding equality, 2) intradistrict and interdistrict racial desegregation and

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[73]Wise, note 8 *supra* at 3.

3) discrimination arising from classifications based on race and sex, or mental, physical, and language handicaps.[74]

Significance of the Problem

In the past two decades laymen and educators alike have exhibited a vastly increased familiarity with the courts' influence on public schools; however, this familiarity with the consequences of litigation often serves to obscure an ignorance of the underlying legal concepts exerting the influence. The proliferation of laws, cases, and their learned interpretations presents a real obstacle to the lay seeker of guiding principles. And apprehension of these principles is a vital necessity if a narrow preoccupation with the immediate consequences of new laws is to be superseded by a broader concern for the ethical concepts responsible for changes in both the theory and practice of public education.

In fact, Richard A. Gorton views influence of the government and courts as one of five main factors affecting school administrators. He maintains that administrators who regard such an influence as "interference" should "move more quickly to identify and resolve problems" leading to government intervention.[75]

Undoubtedly, the body of litigation exerting the most profound influence in public schools is that body concerning the right to equality of educational opportunity. Besides its influence, the sheer

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[74] See Review of Literature, *supra* at 2-8.

[75] Riebard A. Gorton, *Principalship: A Position of Challenge and Change*, 5 Am. Sec. Educ. 4 (1975) at 11.

bulk of the mass of literature connected with it--diffusely located in court cases, federal legislation, state legislation, scholarly research, and scholarly commentary--is perhaps unequalled in the annals of school law. Viewing developments that have led to the present legal interpretation of the concept of equality of educational opportunity as manifestations of the two dynamic American forces of collectivism and pluralism can assist in making the subject more manageable and also more useful for anticipating future trends in school law.

Design of the Study

Data

Data will include both primary and secondary sources. Primary source data consist of: 1) Court cases--state, federal and Supreme court litigation. 2) Laws--federal laws, federal regulations enforcing such enactments, and state laws. Secondary source data include law reviews, scholarly sociological articles and research, scholarly educational articles and research, legal references, and articles from the popular press.

Arrangement of Data

As indicated in the Problem, *supra*, representative data will be selected from both types of sources to provide adequate background for questions which the literature reveals as critical to educational equality from 1954 to the present. There are a variety of schemata which might be used to thematically arrange content demands for equality of educational opportunity in public education. The scheme

utilized in this study is designed to best facilitate revelation of similarities and differences in the collectivistic and pluralistic tensions exhibited in each area. Two large areas emerge, one dealing with questions of equality involving remedies for injuries to school children and the other dealing with remedies for equality where school district boundaries--rather than the children served--become paramount.

Treatment of Data

Data will include representative types of requests reflecting a variety of pluralistic interests in increasing access to equality of educational opportunity.

In addition, the following elements, whenever appropriate, will be analyzed to reveal factors reflecting collectivistic or pluralistic interests.

1. The goal of education sought.
2. The relief desired to meet the educational goal.
3. The group opposing the increased access.
4. The competing arguments.
5. The scope of the remedy prescribed.
6. The factors enabling implementation of the remedy.

An integral part of the narrative will be the interpretation of all elements listed with respect to ethical and practical considerations set forth by recognized legal and educational scholars, and also evaluation of such interpretation as to its relevance to the actual legal interpretation of the term.

CHAPTER III

DEFINING EQUALITY: INJURIES TO CHILDREN

Brown and the South

The term and the idea of equality of educational opportunity gained ascendance with the *Brown* decision in 1954.[76] The definition given to the term by *Brown* in striking down the "separate but equal" standard set in *Plessy v. Ferguson*[77] added as much confusion as it did clarity to the concept. However, the request for relief by the plaintiffs in the class action suit involving Blacks from several southern states versus their respective school districts[78] demonstrates the struggle between pluralism and collectivism that emerges in a demand for extending educational opportunity. The "collectivistic

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[76] Brown v. Board of Education 347 U.S. 483 (1954).

[77] Plessy v. Ferguson 163 U.S. 537 (1896).

[78] Plaintiffs actually represented Black interests in litigation being carried on in several states regarding tangible inequalities and inequalities of segregation. Footnote 1 of Brown v. Board of Education 375 U.S. 483 at states:

> 1. In the Kansas case, *Brown v Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. . . . In the South Carolina case, *Briggs v Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. . . . In the Virginia case, *Davis v County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. . . . In the Delaware case, *Gebbart v Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County.

functions of the educational system. . . to inculcate community norms and a minimum scholastic ability" are crucial issues. Pluralistic interests are manifested by individuals or groups seeking, in various contexts, "to avoid the specific means of imparting academic skills and of socialization that a given educational system is using."[79] The "specific means of imparting academic skills and of socialization" are sources of complaint both to pluralistic interests who want exemption from, or who want more access to, these two educational goals.[80] The example *Brown* set in 1954, however, has stimulated a proliferation of cases in which increased access is the major claim.

Southern segregation cases, of which *Brown* itself was an example, involved the particular pluralistic interests of the Blacks to get an equal share of public education. The unconstitutionality of segregation, plaintiffs complained, lay in the equal protection clause of the Fourteenth Amendment which states that "No State" shall "deny to any person within its jurisdiction the equal protection of the laws."[81]

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[79] Project, Education and the Law: *See generally*, notes 71, 72 *supra* at 1375.

[80] A case of a pluralistic parental interest strong enough to secure exemption from compulsory school attendance was Wisconsin v. Yoder 406 U.S. 205 (1972); however, the court in granting this exemption succeeded in assuring a severely narrow application. Plaintiffs showed that only the time between completion of eighth grade (usually fourteen plus years) and the beginning of the sixteenth year was in question and, further, that religious freedom was involved. In their argument they demonstrated, also, that more institutional education would make students social liabilities within the Amish community, the very thing Americans are trying to avoid in society in general by their twin collectivist educational goals (406 U.S. at 225-26).

[81] U.S. Constitution Amend. XIV.

This clause does not guarantee a right to education; complainants must meet two qualifications to bring the equal protection clause into play. Complainants must reside in a state providing a publicly supported school system and must be able to show that state laws concerning the school system interfere with an individual's right to equal protection under that law. Therefore, in only those states where segregation of races was mandated by statute, could there be a constitutional question. Ostensible opposition to the pluralistic interest of Blacks in a larger slice of the collectivistic benefits of public education, rested, of course, on the argument that a federal order to desegregate interfered with a "state's rights" brand of political pluralism and threatened the autonomy of both states and local school districts to run their own affairs. Blacks and Whites both knew the real argument was to perpetuate separation of the races and maintain the second class status of one of them. The state in equal protection cases could be subjected to strict scrutiny by the Supreme Court since their statutory classification of students by race resulted in discriminatory treatment toward Blacks. Since race has long been held a suspect classification, school officials were obliged to show a compelling interest, and not merely a rational relation, to some legitimate governmental purpose in order to preserve the laws dictating segregated schools. Naturally, the South's strongly held beliefs could not withstand any ethical test.[82]

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[82] Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (New York: Alfred A. Knopf, 1976), at 723-24.

Harm: Social or Psychological?

The *Brown* court, however, did not confine itself to the strict scrutiny test, which in Constitutional terms, was adequate to terminate all "dual" educational systems, and specify in their place, "unitary" systems. *Plessy v. Ferguson* defined equality in "separate but equal" terms,[83] but the case involved privately owned public transportation which citizens were free to use or not use, as they chose, not the governance of a taxpayer-supported, state-operated public school system in which compulsory attendance was the rule. But because the court found additional arguments for deploring segregation instead of applying the minimal legal grounds, several problems involving parents' wishes, and local or community control among both majority and minority interests remain unsolved; on the other hand, the questioning of segregation itself--aside from its constituting a state action has stimulated the court since then to expand the definition of *de jure* segregation to include much of what Northerners had--as self-righteous observers--regarded as *de facto*.[84]

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[83]Plessy v. Ferguson 163 U.S. 537 (1896).

[84]Kirp and Yudof, note 22 *supra*, at 552-53 states: The rationale of *Brown* immediately became the subject of extensive debate and legal scholarship. A main problem was the extent to which *Brown* rested on the social science data as to the "inherent inferiority" of segregated black schools and the infliction of mental harm on Blacks by racial segregation. Some argued that the case did in fact rest on such data and that the result would change if different data were presented. On the other hand, others rejected this thesis on the basis that the data were too flimsy to justify the *Brown* results. Under this approach the data as to schools were irrelevant and the case was said to have rested on the per se unconstitutionality of compelled racial segregation. Those who took this view found support in the fact that after *Brown* the Court in summary *per curiam* opinions struck

The court cited *Sweatt v. Painter*, a decision reached after it was shown that inequality existed for the Black law student because he was denied certain benefits accrued to white students. The court noted:

> Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.[85]

These "tangible" factors are usually calculated to assure that the collectivistic goal of a minimum scholastic ability is accorded the segregated group, and there was grudging acceptance even among segregationalists that these minimums must be honored.[86] The last portion of the statement distinguishing *Sweatt* relegated tangible factors necessary for the attainment of basic skills to second place, however, and gives inculcation of community norms, the other collectivist goal of education, priority: "We must look instead to the

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down other forms of state compelled segregation in such facilities as beaches, golf courses, public transportation, etc., without any reference to social science data. *De facto* evolution to *de jure* is treated *infra*.

[85]Brown v. Board of Education 347 U.S. at 492 distinguishing Sweatt v. Painter 339 U.S. 629 (1950).

[86]Although the tardiness of such equalization casts doubt on their sincerity, in Green v. County School Board, an early desegregation case although appearing fourteen years after *Brown*, the court noted that "Improvements in facilities and equipment have been instituted in all Negro schools in some school districts in a manner that tends to discourage Negroes from selecting White schools. Green v. County School Bd. 391 U.S. 430 (1968); 440-41, n. (e), citing views of the Civil Rights Commission.

effect of segregation itself on public education."[87] The court took a circuitous route to point out that *de jure* segregation detracts from Black children's self-image: "To separate minority children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."[88] Legally sanctioned segregation tended "to deprive them of some of the benefits they would receive in a racially integrated school system."[89] "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority."[90] A recognition of benefits of socialization in community norms which can be gained only in the mainstream of the majoritarian society is implied in the statement regarding integration, but the titles of the expected social science studies cited suggest (as does the expression, "psychological knowledge") concern about psychological effects on the personality of the individual Negro child.[91] In a like manner, the court cited

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[87] Note 85, *supra*.

[88] Brown v. Board of Education 347 U.S. at 494.

[89] *Id.* at 494.

[90] *Id.* at 494.

[91] *Id.* at 494, n. 11: K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Dettscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1918); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 Int. J. Opinion and Attitude Res. 229 (1949); Braineld, Educational Costs, in Discrimination and Natural Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And *see generally* Myrdal, An American Dilemma (1944).

Sweatt v. Painter supra and *McLaurin v. Oklahoma*[92] to demonstrate how precedents had established the importance of the intangible socialization factor. Of *Sweatt* the *Brown* court said: "In *Sweatt v. Painter, supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.'"[93] This statement undoubtedly referred to the passage in *Sweatt* itself which asserted:

> [T]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85 percent of the population of the state and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas bar.[94]

Of *McLaurin* where it had been shown that a Black had been prevented from "intellectual comingling" with majority students[95] *Brown* noted that in that case the court "resorted to intangible considerations" and required that "a Negro admitted to a white graduate school be treated like all other students," concluding, "Such considerations apply

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[92]McLaurin v. Oklahoma State Regents 339 U.S. 637 (1948).

[93]Brown v. Board of Education 347 U.S. 492.

[94]Sweatt v. Painter 339 U.S. at 634.

[95]McLaurin v. Oklahoma 339 U.S. at 641.

with added force to children in grade and high schools."[96] The antecedent of the word "considerations" would be the socialization factors in a logical development of this line of argument, but the sentence which follows indicated instead an unexplainable leap to a sympathetic view toward the individual psyche: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[97]

This inconsistency seems to support the generalization made in the *Michigan Law Review's Project* on educational law: "The process of achieving an accommodation in the desegregation area has heretofore been impeded because courts, in determining the existence of constitutional violations, have tended to undervalue the interests of socialization, while in fashioning desegregation remedies, they have overemphasized these interests to the detriment of pluralism."[98] This generalization is supported by the two ethical principles which Mark Yudof sees as the bases for *Brown* which he cites as "alternative rationales for directing desegregation." The *Michigan Law Review* maintains that Yudof's "racial neutrality principle" is based on pluralistic values and the "universalist" principle is based on collectivist values. The *Review* further contends the desegregation litigation

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[96] Brown v. Board of Education 347 U.S. 492.

[97] *Id.*

[98] Project, Education and the Law at 1404.

can be read as "an accommodation of these principles."[99]

That the "harm" hypothesis is superfluous in establishing the unconstitutionality of state imposed segregation is also apparent in the views of three noted legal scholars writing on the issue of social science evidence. The Honorable William E. Doyle contends:

> But the lesson of *Brown* has little to do with achievement scores. Rather, the key is that the isolation of an entire people is constitutionally wrong--is repugnant also to our most fundamental belief; to our fundamental notion of democracy. No person would argue that any race or group is inferior to another; that it is to be considered unworthy to associate with the excluding group. This is the actual key to the *Brown* decision. This viewpoint no doubt evolved and finally emerged long after the date of the adoption of the Fourteenth Amendment which contains the guarantee of equality under the laws.
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> The reader is apt to object to the foregoing analysis by saying, "Didn't the Supreme Court base its holding in *Brown* that 'separate educational facilities are inherently unequal' *on social science* studies that black children were in fact harmed by segregation? Is not *Brown* based on findings of the power of segregation to create negative self-image among minority children?" The answer to both questions is "no," *Brown* and the cases which follow, *Green County*, *Swann* and *Keyes*, were not predicated on the studies of sociologists and psychologists. They are all based on the fundamental invalidity of isolating a people from other people; that the ideal of *Plessy*--separate but equal--had not been attainable and never would be.[100]

Ronald Dworkin says that *Brown* is based on an interpretation judgment "that segregation is degrading or insulting to the Black minority."

> We don't need evidence for the proposition that segregation is an insult to the Black community--we *know* it; we know it the way we know that a cold causes snuffles. It is not that we don't *need* to know it nor that there isn't something there to

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[99] *Id.*

[100] William E. Doyle, *Can Social Science Data Be Used in Judicial Decisionmaking?* 6 J.L. Educ. 1 (1977), 16. Doyle is a judge for the U.S. Court of Appeal, Tenth Judicial Circuit.

know. There is a fact of the matter, namely that segregation is an insult, but we need no evidence for that fact--we just know it. It's an interpretative fact.[101]

John L. Coons argues that "Equality is not an inference from data; it is an act of faith about intrinsic human worth":

> The judicial history of both school finance and racial discrimination strongly confirms the relative independence of courts from science in the selection of the values to be given expression in the law. Without overlooking the ambiguous role accorded social science in the original decision to outlaw segregation, nor ignoring the references in the finance cases to various scientific revelations; it is clear that the courts would never have reached the stage of citing Kenneth Clark or Christopher Jencks, unless they had already made a lusty normative leap unaided by anything more than their nonempirical values. These specimens of research were relevant only because judges had already accepted some notion of human equality as a value to be incorporated in the process of judicial rule selection.[102]

This notion of human equality would appear to be the rationale for "equal protection under the laws," since unequal protection itself is a type of harm.

District Recalcitrance

Some Supreme Court cases which followed involved outright attempts to disobey the new law of the land. The Little Rock, Arkansas case of *Cooper v. Aaron* is an early example; here the school board and superintendent in carrying out their desegregation plan with the district court's blessing had been thwarted by Governor

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[101] Ronald Dworkin, *Social Sciences and Constitutional Rights--The Consequences of Uncertainty*, 6 J.L. Educ 1 (1977), 5. Dworkin is a Professor of Law, Oxford University, Oxford, England.

[102] John L. Coons, *Recent Trends in Science Fiction: Serrano Among the People of Number*, 6 J.L. Educ (1977), 25. Coons is a Professor of Law at University of California, Berkeley and a noted writer and innovator in school finance cases.

Orville Faubus and the Arkansas National Guard. Children did enter Central High School, but only after local and state police with the aide of crack paratroops dispatched by the president of the United States assured their access.[103] This drama presented on national television made heroes of the Black children and villains of the screaming chorus of Southern white adults on the sidelines, and demonstrated that defying the Constitution would not be tolerated.

After the state of Virginia closed their schools unsuccessfully and was ordered to re-open because it was in violation of its own state Constitution, they gave up such outright defiance.[104] However, Prince Edward County there continued its lonely stubbornness for five years. Its Board of Supervisors refused to levy taxes, closed the schools, and set up a private system for Whites; Blacks refused the offer. The Supreme Court ended the impasse in 1964 in *Griffin v. County School Board.*[105]

These cases illustrate that the Supreme Court will not tolerate pluralistic interests (in segregation) to be asserted by pluralistic political subunits when such interests are in direct conflict with the law of the land. The court ruled in *Griffin* that public education, if offered, was a state responsibility and that responsibility could not be waived in one county of that state. However, in a tribute to local

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[103] Kluger, note 82 *supra* at 754 describes the circumstances surrounding Cooper v. Aaron 358 U.S. 1 (1958).

[104] Harrison v. Day 200 Va 439, 106 SE2d 636 (1959).

[105] A long series of suits ended when the Supreme Court ordered that a public system of desegregation begin in Griffin v. County School Board of Prince Edward County 377 U.S. 218 (1964).

control, it is noted: "Mr. Justice Clark and Mr. Justice Harlan disagree with the holding that the federal courts are empowered to order the reopening of the public schools in Prince Edward County, but otherwise join in the court's opinion."[106] This apparently means that the state (of which the county school system is a sub-unit) would be the only agency so empowered to order such a unit to levy taxes and operate schools.

Local Plans: Built-in Ineffectiveness

Other *de jure* desegregation cases typically arose, not because of outright resistance or a total absence of any official desegregation plan, but rather because a suit was filed charging that the desegregation plan selected was not working. Indeed, the ingenuity of Southern school officials to devise integration plans specifically designed to prevent integration was noteworthy. In *Green v. County School Board* the "freedom of choice" plan advanced in the small rural district by the New Kent School board was blasted as a sufficient step to "effectuate a transition" to a unitary system because: [In]

> three years of operation not a single white child has chosen to attend Watkins and although 115 Negro children enrolled in New Kent school in 1967, 85% of the Negro children in the system still attend the all Negro Watkins school. Rather than further dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility Brown II placed squarely on the school board.[107]

Swann v. Charlotte-Mechkenberg, like *Green*, represents a suit against a desegregation plan that did not work. However, the Burger

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[106] *Id.* at 234.

[107] Green v. County School Board 391 U.S. at 441-42.

court here, because of the largeness of the district in terms of area and number of students, and because of the ineffectiveness of the voluntary based Finger Plan, ordered the district to adopt "forced" busing as a remedy even though it held that there is no constitutional obligation to either establish or maintain rigid ratios.[108] *Adams v. Richardson* presents a variation on the theme of desegregation plans which don't work. In this case litigated during President Nixon's second term, plaintiffs had to sue the Department of Health, Education and Welfare to make it comply with its own rules--which were themselves generally acceptable.[109]

Educational Collectivism Survives Political Pluralism

The definition of equality of educational opportunity which emerges from *Brown* and the other Southern desegregation cases discussed *supra* is both satisfyingly narrow and provocatively broad.[110] The right

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[108] Swann v. Charlotte-Mecklenberg Board of Education 402 U.S. 1 (1971). This was noteworthy for two reasons: the specificity in the remedial order, and the method of busing itself. Kluger points out (Note 93, *supra* at 766-67) that this was the second desegregation decision of President Nixon's handpicked chief justice, coming down at a time when Nixon himself was trying to slow down desegregation and particularly busing because of campaign promises. In *Green* the first desegregation case of the court, Burger himself wrote the unanimous decision in which he ordered an end to dual school systems "at once." Kirp and Yudof (note 22 *supra* at 393) suggest that the dissatisfaction with the *Swann* busing decision and the subsequent anti-busing legislation reflected a concern for the application of busing remedies in the North.

[109] Adams v. Richardson 480 F2d 1159 (DC Cir 1973).

[110] Three Southern cases were deliberately omitted from this discussion, but will be analyzed *infra* in a section devoted to the specific tensions between collectivism and pluralism characterized by inter-district desegregation cases: Wright v. Council of Emporia 407 U.S. 451 (1972), U.S. v. Scotland Neck Bd. of Educ. 407 U.S. 484 (1972), and Bradley v. School Board of Richmond 412 U.S. 92 (1972).

to the educational goal of socialization in the values of the majoritarian society was successfully asserted for a pluralistic group (Blacks). *Brown* accorded that collectivistic right to this minority group specifically because it had been denied this right on the constitutionally impermissible grounds of race by statutory state action. In theory, but not in practice, Blacks had been accorded the right to equal education in the basic academic skills by *Plessy*; actual access to this collectivistic goal is enhanced by admission to the mainstream. *Brown*, curiously, went on to say that segregation should also be stopped because of the psychological harm it imposes on Black children. The succeeding cases showed that the law could not be flaunted through force or legislation and that the school districts must devise plans that work.[111] To insure the success of such plans, the federal government could send troops, order a specific remedy like busing, order that taxes be levied, or force H.E.W. to comply with its own rules--so long as the desegregation plan was confined to the defendant "local" district. And desegregation was made the responsibility of the local district. Coons contends that "the court changes the status quo only when it is reasonably confident that settled values--federalism,

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[111] *But see* Shuttlesworth v. Birmingham Bd. of Educ. 358 U.S. 101 (1958). In their book published in 1974 (note 22 *supra* at 310) Kirp and Yudof comment: "It is hard to account for the court's action," their pupil placement plan "was unquestionably unconstitutional, and [Compare Cooper v. Aaron 358 U.S. 1 (1958)] the case is still the only school desegregation case decided by the Supreme Court in which the Black plaintiffs have not prevailed." Cases litigated since their writing in which Blacks and other minorities have, however, lost will be discussed in the section on Interdistrict Desegregation, Chapter IV *infra*.

legislative discretion, enforceability--will not be unduly jeopardized."[112] Thus, the court in *Brown* 2 stated:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[113]

This situation might seem as though the fox is in charge of reforming the hen house, but Kluger contends that:

> The two *Brown* opinions, taken as a unit, did in fact launch the desegregation process. It began, as any tactician might have recommended, in the border states and then seeped deeper into the South, starting generally in the cities. Wisely or not, the Supreme Court avoided making the process seem like a revival of Reconstruction, for, practically speaking, it placed effective control of the undertaking in the hands of Southerners themselves--the fifty-eight federal judges manning the twenty-eight United States District Courts and two Court of Appeals circuits, the Fourth and Fifth, serving the South. These men, whatever their limitations, however ill-disposed they were to dismantling the most fiercely held tradition of their region, were mostly a blend of Old South aristocrats and New South urbanites; they were not backwoods lynchers or potbellied sheriffs or closet Klansmen. They were, generally speaking, about the best of the white South. And perhaps the nine men in Washington knew that only the white South could truly liberate the black South. Perhaps all the Supreme Court could do, short of risking massive insurrection, was to proclaim to the nation that the enforced separation of human beings by race was neither God's will nor the purpose of the Constitution as amended after the Civil War. Perhaps the most the Justices could do, in plainer language, was to say that segregation was wrong and then rely on the best instincts of the American people to figure out how to eradicate the practice.[114]

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[112] Coons, *supra* at 26.

[113] Brown v. Board of Education 349 U.S. 294 (1955 at 294).

[114] Kluger, *supra* at 746.

Brown and the North

De Facto Segregation: A Search for Illegality

The Northern desegregation cases had their germination in the psychological harm issue pressed in the famous Footnote 11 in *Brown* I.[115] If the Black child suffered such harm from the circumstance of segregated schools, how could it be argued that only state-created dual systems presented a problem?[116] However, the harm argument is precarious since the Court--to find a violation of the equal protection clause--found segregation unconstitutional because *state* laws invidiously classified a racial group. It went on to say that state mandated segregation induces psychological harm in the segregated group. Therefore, a group suffering psychological harm has no recourse to the equal protection clause unless: (1) a state action has caused the harm (2) the group belongs to a suspect classification. Actually, if the latter two conditions exist, the harm factor is irrelevant--the group could be experiencing a completely neutral effect. Indeed, Judge Doyle insists that [C]ourts do not take social science judgments as the touchstone of constitutional interpretation because such data is "adjective rather than substantive" in nature.[117] Besides harm, another

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[115] *See* note 91 *supra*.

[116] The harm argument for eliminating *de facto* segregation is one of five Frank I. Goodman lists as comprising the rationale for its inherent unconstitutional status. *See generally* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Cal. L.R. 275, 298-374 (1972). The "fundamental right" argument, note *infra* is another argument he lists. The other three--regarding neutral state action, state-induced housing, and the neighborhood school--can all be satisfied by a broadening of the *de jure* interpretation.

[117] Doyle note *supra* at 18.

argument frequently advanced against segregation is that it violates the Fourteenth Amendment because "education is a fundamental right," another condition that invokes the court's strict scrutiny test.[118] *Brown* reinforced the Constitution's silence on this issue saying "such an opportunity, [only] *where the state has undertaken to provide it*, is a right which must be available to all on equal terms."[119] It is true that:

> Although the Constitution of the United States contains no direct reference to education, most state constitutions have specific provisions which make education a legal responsibility of the state. Moreover, the statutes of most states stipulate in considerable detail how schools are to be governed. Much of this control is delegated to district boards of education and to other bodies all of which become a part of the state system of education.[120]

But, according to Dworkin, the right to an education cannot be compared to:

> [A] constitutional right guaranteeing the liberty to speak if you want . . . the matter cannot be that simple in the case of school assignments. Why? Because there is no comparable discretionary right--that is a right an individual can exercise or not. *A school district cannot provide a school of one's choice; it provides a school.* And therefore the normal strategy of a discretionary right, like the right to speak or not, or to have an abortion or not, won't work. The special features of the school assignment issue therefore require different kinds of rights.[121]

An extension of the "educational opportunity as a fundamental right"

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[118] See note 2 *supra*.

[119] Brown v. Board of Education 347 U.S. at 493.

[120] Roald F. Campbell et al., The Organization and Control of American Schools (Columbus, Ohio: Chas. E. Merrill Publishing Company, 1970), 48.

[121] Dworkin, at 11.

argument contends that if segregated schools are inferior, then even if there is no state role in segregation, it must do something to equalize (redistribute students) since a suspect classification is involved.[122] Taken to its logical conclusion, this argument would force desegregation on Black parents' who have a right to choose a Black school if they wish. Such issues have arisen in a large metropolitan area such as New York, where community control has been advocated--and to an extent realized. Largely a protest against slum schools and unresponsive bureaucracy, the movement is questioned by both White and Black integrationists because of its tendency to reinforce ethnicity.[123] In fact, militant leader Stokley Carmichael found integration to perpetuate subservience to the Whites--since to advance Blacks were told they must go to school with Whites and move into their neighborhoods.[124] There was no market for socialization in the majoritarian values among his followers. Moreover, Kirp maintains the constitutionality of community schools is shaky, since they are creatures of deliberate state action and purposely reinforce segregation.[125]

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[122] Goodman, note 2 *supra*

[123] *See generally*, Campbell at 382-86 and Leonard J. Fein, *Community Schools and Social Theory: The Limits of Universalism*, The School in Society, eds. Sam D. Sieber and David E. Wilder (New York: The Free Press, 1973), 412.

[124] Kluger *supra* at 761-62.

[125] This and other potential problems are examined (posed by Brown) for community control. Kirp, *Community Control, Public Policy, and the Limits of the Law*, 68 Mich. L.R. 1355 (1970).

Conditions in the North: A Contrast

The situation in the North predating its desegregation was in many ways a contrast to the South. It typically had no segregation laws on the books. It had a proud, liberal heritage which had condemned the racism of the South. It enjoyed seeing the South squirm. It was complacent because of the absence of Jim Crow and *de jure* segregation. Its Blacks were living "by choice" in huge urban ghettos where they also went to school.

The last mentioned difference accounted for the peculiar problems desegregation in the North presented. Since frustrated, unemployed, poverty-striken Blacks were herded into huge urban ghettos, they were more easily organized by radical militants bent on riot and race war. Whites, besides whatever other reasons they had for opposing or approving of desegregation, were fearful of the urban Blacks. The Southern experience seemed like a Sunday School picnic by comparison.[126]

Once thrown together in the same school, several difficulties arose, primarily because the presence of two divergent social classes made common achievement and socialization experiences impossible.[127] Problems of discipline, teacher, and curriculum adjustment in the integrated school led alternately to tracking or to a middle class exodus. When the two races were brought together in the same school, difficulties attending the mixture of two [divergent

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[126] Kluger at 758, 762.

[127] James S. Coleman, *The Concept of Equality of Educational Opportunity*, The School in Society, eds. Sam D. Sieber and David E. Wilder (New York: The Free Press, 1973), 132.

> [T]rack systems or practices of homogeneous grouping, discriminatory or not, may segregate pupils rigidly within the "integrated" school. And in cities where racial tensions are especially high, such as in Chicago and Cleveland, Negro students attending white schools have been assaulted, and it is often a community prophecy (and in a part a self-fulfilling one) that integrated schools will become all Negro.
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> More important, the school system cannot control its own personnel. The heart of successful integration is the classroom teacher, and many big city teachers do not feel comfortable teaching Negro students or handling an integrated class. Further, it is a big city tradition that the integrated school is a "changing" school, where teachers transfer out, morale drops, and high-level programs are phased out as no longer appropriate to the clientele.[128]

> Findings of an experiment conducted by Bruno Bettelheim in cooperation with the Russell Sage project indicate that teachers' difficulties in dealing with Negro children who present behavior problems flow not principally from racial prejudice but from social class views in which the teacher assumes that the children are unlikely to learn.[129]

"Many of the quotations from interviews with teachers of inner-city schools showed their preoccupation with the control of behavior. Teachers say they cannot teach because they are so busy trying to control their pupils' behavior."[130] Parsons maintains that cognitive learning and socialization complement each other as functions of the classroom social system.[131] Robert Dreeben has shown dramatically that the function of the classroom as a social system, regardless of the

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[128] Robert L. Crain and David Street, *School Desegregation and School Decision Making*, Governing Education, ed. Alan Rosenthal (Garden City, New York: Anchor Books, 1969) at 358.

[129] *Id.* at 359.

[130] Campbell, at 306 (quoting Robert J. Havighurst, The Public Schools of Chicago (Chicago: The Board of Education, 1964)) at 171.

[131] Talcott Parsons, *The School Class as a Social System: Some of its Functions in American Society*, 29 Harv. Educ. Rev. 4 (1959), 297.

content of the instruction, is the crucial bridging process between the child's home and his entry as an adult into industrial society and work.[132] The practice of tracking, the problems of middle class teacher expectations, and the deterioration of instruction in the face of an uncontrollable classroom all prevent the school from functioning as an effective socialization agency--the indispensible element that integration lends to "separate but equal," fought for so hard in *Brown*. Unlike the South, the North shunned outright resistance or legal maneuvers to circumvent the 1954 dictum when it crossed the Mason-Dixon Line; instead it handed the big city school districts over to the minorities--in a retreat aptly named "white flight." "The very concept of school integration was thus being severely imperiled by a new generation of massive residential segregation beyond apparent reach of the law."[133]

The Inadequacy of Harm

Proponents of the harm hypothesis insist that all segregation is harmful, and that the distinction between *de jure* and *de facto* is irrelevant. According to them *Brown* said it was psychological harm that made segregation itself unconstitutional. They generally deplore the fact that research results are so mixed, that a clear case for harm

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[132] Robert Dreeben, On What Is Learned in School (Reading, Mass: Addison Wesley Co., 1968),

[133] Kluger at 773. It is true that many "voluntary" plans, concocted in the North, were rejected by courts--however, the emasculation of integration in most large cities was caused by what Kluger calls "the White middle-class exodus to suburbia" leaving "a lop-sided population," at 768.

could not be made, and that courts in the North could not, therefore, dispense with the *de jure-de facto* distinction. However, this argument[134] is fraught with danger at every turn since:

1. Merely proving harm in a group will not bring the equal protection clause into play--the group harmed must be in a suspect class and must be the victim of state action.

2. Non-suspect and suspect classes alike go to court expressly to inveigh against a state action in education cases, otherwise how would they know who the defendant is?

3. *Brown* said psychological harm resulted from *state imposed* segregation. Ostracism with legal force is the ultimate insult--it makes inferiority official--and the humiliation officially recognized by all the country's citizens.

4. *Brown* said *psychological* harm--the researchers, Coleman *et al* --have had mixed results trying to show *academic* harm. The thin shreds of evidence they *do* produce to recommend integration are irrelevant to the harm issue *Brown* raised.

5. It is fortunate for the Blacks that the harm hypothesis is not the reason for the unconstitutionality of segregation. The experts

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[134] Richard Roth, Judicial Standards in Public School Segregation Cases: 1850-1975 (unpublished Doctor's dissertation, University of Minnesota, 1976), at 171. For citations of scholars who think the distinction between *de jure* and *de facto* segregation is artificial, *see generally* Roth at 149-51. For a survey of the inconclusive research, see Roth at 165-71, which concludes with: [If] research offered conclusive results which positively identified a significant increase in the academic ability of blacks and whites who attend integrated schools courts and legislatures "could look at the fact of segregation in the North. . . . A strong moral imperative would be established. But the research has not been nearly so clear; consequently, *de jure* has remained a necessary standard in the North."

who believe in this have not been able to prove conclusively that it exists.

6. Blacks who do not suffer harm (psychological--or academic) from *de jure* segregation because of some peculiar set of circumstances have as much right to equal protection under the laws as do harmed Blacks. They are constitutionally entitled to freedom from state laws which dispense state services along racial lines--whether they have been harmed or not.

7. Calling "all" segregation unconstitutional would make desegregation compulsory, whether all Blacks (or Whites) wished to be desegregated or not; such a ruling would conflict with other basic constitutional rights.

8. Saying desegregation is the only way to eradicate (unconstitutional) psychological harm is racist--this means that one inflicts such harm upon one's self by living, going to school, and working with one's own race.

9. Proponents of the psychological harm theory ironically point to the judicial and educational recognition of the importance of the schools in the assimilation process indispensible to our pluralistic culture.[135] And it is true, the benefits that elude Blacks--according to the comparisons made in the trial to *McLaurin* and *Sweatt*--are sociological, not psychological.[136] Minority isolation inhibits the

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[135] *Id.* at 172-75.

[136] Notes 92-95 *supra* and accompanying text.

complete socialization process American schools are historically expected to provide.

10. Proponents of the harm theory who fail to recognize the necessity of the existence of state action in equal protection questions also ignore other aspects of that action. Equality does not extend beyond the local school district.[137] *Brown* did not cross district lines. An equal educational opportunity in New Kent County, Virginia (*Green*) means one equal to others in that local school district, not equal to one in another district in that state, or another district in another state--North or South.

Bell, Guinn, and Keys: The Embrace of De Jure

However, there is logical development of court ordered desegregation in the *North*. How did it come about with conspicuous state action obviously missing? The arguments of harm or benefits of mingling with the majority, although they may have prompted a philosophical impetus, have had little legal influence in Northern desegregation court decisions. Although on that day in May in 1954 the narrow decision announced by Chief Justice Warren did not portend the extension of the ruling to the North, the idea of the injustice of segregation was one the North liked--and enjoyed seeing forced on the South.[138] While the South procrastinated, Northern urban school districts became Blacker and more segregated--in large part a result

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[137] Interdistrict desegregation questions will be analyzed in Chapter IV.

[138] *See* Kluger at 667-702, an account of the behind-the-scene preparation for the decision.

of the Black migration from Southern districts.[139] The Northern idea of the injustice prevailed, but how could *de facto* segregation be legally proscribed within the narrow limits of the *Brown* decision?

An examination of an early Supreme Court refusal to uphold the plaintiffs' appeal for recognition of state action in a Gary, Indiana case is nevertheless prophetically affirmative in the criteria it establishes.[140] The defendant school district had been able to show that segregation was aggravated by the influx of Blacks to one area of the city, and that it had merely maintained its neighborhood policy--well established before this influx. When predominantly Black neighborhood schools were filled, students were enrolled in the nearest predominantly White schools with space. A natural barrier made by the Calumet River and multiple railroad tracks would have required the district to pluck 50% of the Blacks from one side and bus them out into the White neighborhoods and simultaneously "go out into the forty-two square miles of the City of Gary into the so-called White districts, and bring into the Tolleston School a sufficient number of white students to correct the imbalance."[141] More important than the evidence against segregative intent and the inconvenience of an effective remedy, was the impressive showing of a real unitary school

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[139]Bell v. School City of Gary, Indiana 324 F. 2d 209 (1963) at 210: "The student population in the public schools of Gary for the 1951-1952 school year was 22,770 of which 8,406 or approximately 37% were Negroes. In the 1961-1962 school year there were 43,090 students in the public school system, and 23,055 or approximately 53% were Negroes."

[140]377 U.S. 924 (1964).

[141]*See generally*, Bell v. Gary at 212.

system--one not operated solely by Whites, nor characterized by identifiable Black or White schools:

> The Board of School Trustees is a bipartisan Board of five members appointed by the Mayor. The Board elects its own officers. Dr. LeRoy Bingham, a Negro, was the President of the Board when this suit was commenced. At the trial, he testified there was no policy of segregation of races in the Gary School system. He also testified the Board adopted a policy of transferring students from several congested areas to less congested areas in order to try to balance the loads in the various buildings; that it was the policy of the Board to make complete use of the facilities available for the benefit of all the children in the school system without regard to race.
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> The School staff has been integrated. A Negro occupies the position of Assistant Superintendent of Schools. He is one of three Assistant Superintendents. A Coordinator of Secondary Education is a Negro as is the Supervisor of Special Education, the Mathematics Consultant, a coordinator in the Food Services Department and a member of the Special Services Department who devotes a large part of his time to the problem of proper boundary lines for attendance areas. There are eighteen Negro principals and thirty-eight white principals. On the teaching staff, there are 798 Negro teachers, 833 white teachers and 3 orientals. All schools with the exception of one small elementary school have at least one Negro teacher on the staff. All but five of the forty-two schools have at least one white teacher.[142]

Thus, when sending the *Green* school officials back to the drawing board three years later in 1967, the new Burger court in the last statement of the opinion could proclaim that these officials must "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[143] In *Kelly v. Guinn*, a Las Vegas case, staff assignment becomes a clear gauge of the school officials' intent--a decisive factor in establishing *de jure* segregation:

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[142] *Id.* at 211.

[143] Green v. County School Board 391 U.S. at 442.

> Teacher assignment is so clearly subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition or transportation problems, that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices.[144]

Another important indicator of intent, it said, was "school construction policies that create or aggravate racial segregation."[145] It also questioned the boards' naiveté in passing off elementary school segregation (in light of faculty assignment and construction policies to the contrary) as an unexpected outcome of its commitment to a neighborhood school policy when such a policy--the board proudly noted--had been abandoned in the secondary schools for the self-expressed purpose of avoiding one-race schools.[146]

The sentimental neighborhood school song became a familiar, but weak, defense for Northern segregation. It, like the harm issue, is typically "adjective rather than substantive" to the argument.[147] It held in *Bell* only because *de jure* intent was not evident to the court from the indicia of faculty assignment and school construction policies.[148] In *Kelly v. Guinn* these indicia undermined the sincerity of such an argument.[149]

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[144] Kelly v. Guinn 456 F. 2d 99 (1972) at 107--a paraphrase of the next statement cited from Davis v. School District of Pontiac, Mc., 443 F. 2d 573, 576 (6th Cir. 1971).

[145] *Id.*

[146] *Id.* at 108.

[147] Doyle, note 117 *supra*.

[148] 324 F. 2d 211-12.

[149] 456 F. 2d 107-8. *Swann* was frequently cited as precedent for dispensing with neighborhood schools if necessary to effectively destroy segregation--with busing.

The situation in *Keys v. Denver* is similar to that in *Guinn*; however, two new criteria were added because the defendant school board added an argument to the increasingly ineffective neighborhood school excuse.[150] They maintained that even if *de jure* segregation had been found in one part of the school district, it was the responsibility of the plaintiffs to show that segregative intent had been manifest in the rest of the district if the whole system were to be used as the integrated unit. The Supreme Court, however, placed the burden of proof on the defendant board to show that it had *not* been guilty of segregative intent in operating the remainder of the system--one which contained a large minority core city sector. Thus, once any violation is found, the burden of proof in segregation cases shifts to the defendant to prove its *de facto* status.[151] The other victory dramatically lowered the percentage of a particular minority necessary to establish a school as segregated. Contrary to board wishes, Hispanics and Blacks were ordered added together for a unit of minority count.[152]

In a separate opinion (not dissenting) Justice Powell opened the *de jure* door even further. In deploring the "legalism" that perpetuated the *de facto-de jure* distinction, he supplied new arguments for judges wanting to maintain the distinction, yet not wanting Northern desegregation hampered by the proof of even partial "intent"; he said that state-sponsored public schools are involved and it should be

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[150] Keys v. Denver 413 U.S. 189 (1973).

[151] *Id.* at 208.

[152] *Id.* at 197.

constitutionally irrelevant "whether the segregation is state-created, state-assisted or merely state-perpetuated."[153] Thus, although state segregative intent is still a requirement, courts have freely adopted Justice Powell's presumption of intent so long as segregation exists. "School boards, therefore, are increasingly being required to prove that segregative intent was not among the factors that motivated their actions."[154]

Pluralism Upsets the Melting Pot

The circumstances of Northern school segregation--which differed radically from the circumstances in the South--twisted the definition of equality in educational opportunity in surprising ways. The concentration of Blacks into huge urban sectors (each of which typically fell under the control of one school district) was in sharp contrast to the more uniform distribution of Blacks throughout both rural and urban areas within a particular district in the South. Large scale residential segregation in the North created huge pockets confronted by the educational and social burdens that desegregation entailed, while

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[153] *Id.* at 227.

[154] Education and the Law at 1413. The *Michigan Law Review* continues: "Thus, the Second, Third, and Eighth Circuits applied such a presumption when it was established that school authorities had engaged in acts or omissions, the natural and foreseeable consequence of which was to bring about or maintain segregation." These cases are: United States v. School Dist. of Omaha, 521 F. 2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), *Id.* 200.

leaving vast sections of White population untouched by the process.[155] A White urban work force, factories, and high tax base were disappearing from the core cities to materialize in one-race suburbs; unemployed people, unused buildings and a lowered tax base expected to serve a high cost educational clientele remained.

The conflict over desegregation in the North, as in the South, found the pluralistic interests of minorities (Blacks and Hispanics) in gaining access to collectivistic interests in education--academic skills and socialization--in conflict with the interests of political sub-units (local school districts). The political sub-units' pluralistic interests did not philosophically (or even financially, to any great degree) oppose the academic access. And even though it had preached the "melting pot" theory over the years for immigrants and Southern Blacks, and thus would appear to have been committed to socialization philosophically, it had gone to great lengths when it came to other races to avoid putting them in its melting pot--much less stirring the mixture.

And although the harm hypothesis may have brought philosophical arguments to bear against segregation, it was extraneous as far as the legal definition of equality of educational opportunity and the equal protection clause were concerned. Besides, finding a legal way to outlaw segregation in the North didn't prove difficult. First, criteria were established that made Black schools discernible

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[155] *In* Booker v. Special School District No. 1, 351 Fed. Supp. 799 (1972), an unusual point is raised in this regard. Black and White plaintiffs argued that Whites suffer an incomplete socialization experience in segregated schools.

from White schools. In *Bell* (1964)[156] the court overlooked the segregated condition of the schools because there was evidence to show that the political sub-unit had tried to subvert the trend: placement of overflow Black students into predominantly White schools with space, the absence of portable classrooms, and the integration of faculty and administration. Since segregative intent (state action) could not be shown, the district was under no affirmative obligation to desegrate, but rather was allowed to continue its racially neutral policy. In *Kelly v. Guinn* (1972)[157] the use of the argument by district forces that elementary assignment patterns furthered the neighborhood school concept, was aborted by their prideful attitude toward their desegregated secondary system, in which neighborhood considerations had admittedly been scrupulously avoided. But *Keyes*, (1973)[158] the first Supreme Court ruling against segregation outside the South, stretched the meaning of *de jure* segregation to cover almost any kind of segregation the North had displayed. Now a local festering of discrimination was a sign of a general infection; the finding of one violation in a district shifted the burden of proof to the defendant; furthermore, Northern courts began to extend this to Justice Powell's contention that the court need not find a violation at all. Segregation itself became *prima facie* evidence of state responsibility unless the board could show that neither action nor inaction was an accessory. *Keyes* also ruled that desegregating Blacks

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[156] 377 U.S. 924.

[157] 456 F2d 100 (9 Cir.)

[158] 413 U.S. 189.

by placing them with an equal proportion of Hispanics did not satisfy the *Brown* definition of equality of educational opportunity. Because of their majority representation an all White school cannot be described as segregated, but a school with a predominant minority, despite the race of the minority, can be.[159] In all the cases listed, except *Bell*, plaintiffs' denial of access was declared unconstitutional because the subunit of the state representing the interests of political pluralism, had wittingly or not, fostered the condition of segregated schools. In each case the desegregation assignment became the responsibility of local school authorities to carry out in their own district.[160] No real threat to political pluralism and local autonomy emerged, even though a majoritarian group in control of the pluralistic political sub-units had thwarted socialization in their *own* values by another pluralistic racial group. The academic assertion of Blacks, although not as direct a thrust, was satisfied obliquely in the criteria--faculty, facilities, and construction of buildings--that were examined for evidence of segregative intent. Academic equality is also presumed to follow in on the coattails of White students thrust into formerly Black schools, while a White school itself is popularly considered *prima facie* evidence of academic resource equality--however one cares

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[159] Opinion expressed by Clifford Hooker in "Educational Policy and the Law" (8-225), a course in the Department of Educational Administration at the University of Minnesota, summer, 1974. Membership in a suspect class is necessary in order to be considered segregated.

[160] Desegregation cases involving more than one district and presenting a threat to local antonomy have consistently ruled in favor of the defendant boards. These cases will be examined in Chapter IV. *infra*.

to compute it.[161] Moreover, the courts made local districts a desegregation offer they couldn't refuse--they offered help through federal legislation to districts attempting to serve traditional clientele in more effective, but costly, ways. Threats of withholding all federal educational funds to non-complying districts re-enforced the offer.[162]

The socialization assertion of Blacks was slower in being realized. Until the 1970's, courts--in assessing inconsistent majoritarian motives--refused to find sufficient violation and thus failed to place enough emphasis on the importance of the socialization goal.[163] Once the rationale for violations was e tended, however, courts went overboard in dismissing pluralistic interests of communities and racial groups in their remedial orders. But in 1976

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[161] *See* Coleman, note 127 *supra* at 143. The disparity between races in educational equality was not as great as in the South according to a graph depicting the results of a survey he conducted by mandate of the Civil Rights Act of 1964. Southern Whites were considerably lower than Northern Whites yet the gap between Southern Whites and Southern Blacks is much wider than between the two Northern racial groups.

[162] *See* Roth, *supra* at 163-64. Roth points out that the courts acting without both the aid of Congressional action and the threat of withdrawal of federal funds were ineffectual, and also that federal involvement was carefully confined to findings of *de jure* segregation; and *see* Kirp, *Law and Politics*, 47 Harv. Educ. R. 2 (1977) 117-137 at 121 and 20. "Resource inequalities within districts have lessened considerably as a consequence of the federal statutory requirement that nonfederal expenditures in schools receiving compensatory-education funds be 'comparable' to expenditures in other schools in the same district."[20]

[20] Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241(e)(a)(3); for regulations promulgated under the Act, *see* 45 C.F.R. § 116.26 (1975).

[163] Education and the Law, *supra*.

the *Michigan Law Review* could submit that:

> [T]he courts are now re-evaluating the countervailing interests in desegregation and, as a result, have begun both to expand the theory of violation and to limit the scope of their remedial orders. Thus, courts now appear to be gradually achieving an accommodation consistent with that reached in other conflicts over access to education.[164]

Such accommodation has been possible because the scope of remedial orders had already been limited to the individual offending school district in deference to the Constitutional recognition of political pluralism. Likewise, Hooker sees two types of indications of judicial accommodation to public disillusionment with heavy-handed cures: 1) the recent Supreme Court cases in *Pasadena* where the court, citing *Swann*, refused involvement in resegregation litigation, and in *Austin* and *Dayton* where it tended to favor new narrower remedies 2) the trend toward simplified litigation as evidenced in the granting of a Consent Decree in Springfield (Ill.) and the District Court approved out-of-court compromise concluding ten years of litigation in Atlanta.[165]

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[164] *Id.* at 1410.

[165] See Clifford P. Hooker, *Issues in School Desegregation Litigation*, N.S.S.E. Yearbook, May 1977 at 113 . *See also*, Pasadena City Board of Educ. v. Nancy Anne Spangler, 44 U.S.L.W. 5114 (June 28, 1976); Austin Independent School District v. United States 44 U.S.L.W. 3413, 1976; Dayton v. Bd. of Educ. v. Brinkman, No. 76-539 (S. Ct. Jan. 77) (*cert. granted*); McPherson v. School District 186 Springfield, Ill. Civil Action no. S-Civ. 74-44 (S.D. Ill., 1974); Calhoun v. Cook. Civil Action no. 6298 (N.D. Ga.)

Brown Opens the Equality Door

After it became clear that children could not be denied an equal opportunity to education on the arbitrary grounds of race, many other groups decided access to education, which the state deemed important enough to be compulsory, should not be denied on the basis of other arbitrary grounds. Thus *Brown* became the impetus for extension of equality of educational opportunity for victims who had suffered limited access or exclusion because of marital status, sex, test scores, mental and physical handicaps, or the inability to speak English. The pluralistic nature of each group was based on a common trait members shared that had served to limit their opportunity to an education equal to a more favored group in the mainstream of American life.

Sex-Related Discrimination

The tradition of discrimination in public education because of sex is in many respects in sharp contrast to racial discrimination. While most Blacks were excluded from the benefits of socialization and quality academic education with the majority, White women suffered neither of these deprivations and in fact make up half of the majority from which the racially ostracized had been excluded. By practically any gauge one would select girls function more successfully than boys in the regular curriculum; in addition they are under-represented in remedial classes and discipline problems.[166] Ironically,

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[166] *See generally* Yudof note 22 *supra* citing N. Frayer and M. Sadher in Sexism in School and Society 86-106 (1973) at 503.

two atypical cases regard relief from the requirement that girls meet higher academic qualifications than boys to be admitted to elite public schools.[167] These atypical cases concern school offerings designed to meet the two collectivistic goals of providing competency in academic skills and a general socialization experience instead of concerning peripheral issues.[168] That suits involving sex discrimination regard the periphery of public education is underlined by the absence of educational sex discrimination cases in the Supreme Court, and the dearth of them even in lower courts. Ironically, in these cases there are references to *Reed v. Reed* and *Frontiero v. Richardson*[169] which are indeed Supreme Court cases but neither involved education nor true equal protection pleas since the high court refused in either case to elevate sex to a suspect classification even though it ruled in favor of plaintiffs in both cases.[170] *Reed* struck down an Idaho statute giving men preference over women for appointment as administrator of a decedent's estate and in *Frontiero* the Court ended discrimination against service women involving seeking of dependent's benefits. Without suspect status, equal protection is difficult to bring into play since the state must show only a rational relation to the rule in question.

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[167] Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) and Berkelman v. San Francisco Unified School Dist. 502 F. 2d 1264 (9th Cir. 1974).

[168] Cases concerning peripheral areas are discussed *infra*.

[169] Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); note 116, *infra*.

[170] McCarthy note 42 *supra* at 179.

In these cases and in *Board of Education v. LaFleur*[171] the Supreme Court took a circuitous route by elevating the requirements of a rational relation and due process to avoid awarding sex suspect status and thus set the precedent for requiring the state to show a compelling interest anyway for its rules in subsequent sex discrimination cases.

Women do not clearly meet all the criteria for suspectness which Betsy Levin has assembled into a concise list:

1. Does the class have an immutable characteristic?
2. Has there been a history of invidious discrimination against the class in question?
3. Is the class a discrete and insular minority?
4. Is the class politically powerless?
5. Does the classification stigmatize members of the class as inferior?[172]

Number 1 is a resounding "Yes" while Number 3 is a definite "No." Numbers 2, 4, and 5 are subject to a variety of interpretations, when compared to suspect classes such as race, bastards, or aliens.

Perhaps this ambiguity is the reason that sex litigation has proceded along "separate but equal" lines in the lower court athletic

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[171] LaFleur v. Bd. of Educ. 325 F. Supp. 1208, 1213-14 (N.D. Ohio 1971); the Supreme Court, in the case involving forced maternity leave for teachers at a designated point during pregnancy, ruled in favor of the women on due process grounds since pregnancy involves a decision concerning marriage and family life. The lower courts had decided on equal protection grounds.

[172] See Betsy Levin, *supra* note 49 at 34. For information on sex, suspect classification, and the Supreme Court, also *see generally* *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Norwestern U.L. Rev. 4 (1971), 481; Murray, Pauli, *Economic and Educational Inequality Based on Sex: An Overview* 5 Valparaiso U.L. Rev. (1971); *Sexual Caste System* 5 Valparaiso U.L. Rev. (1971), 221; Spitzer, Sally Barker, *The Supreme Court 1974 Term and Sex Based Classifications: Avoiding a Standard of Review*, 19 St. Louis U.L.J. (1975), 375.

cases. In *Brendan V. Independent School District* two female athletes sought placement on interscholastic boys' teams. The Minnesota High School League prohibited interscholastic competition between men and women, yet provided no all women's teams in tennis, cross-country skiing or track for these girls. The court maintained that plaintiffs could not be denied the benefits of activities provided by the state for male students.[173] After a case involving a similar problem in Indiana four of the five justices said that had "comparable" girls teams existed, they would have ruled against the girls.[174] In *Bucha v. Illinois High School Association* girls wanted the superior training and competition of a mixed team while a girls' team was available; the court ruled against them asserting a "rational relation" to such classification given the physical difference in sexes and thus a forseeable tendency toward "male domination" leading ultimately to "a decrease in female participation."[175] In a similar case involving a Pennsylvania athletic association rule the court said "In the realm of sports competition, unlike that of racial discrimination, it is justifiable and should be allowed to stand where there is a rational basis for the rule."[176] In both the *Haas* and *Bucha* cases plaintiffs urged the strict scrutiny standard applied in *Sail'er Inn v. Kirby,*

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[173]Brendan v. Independent School District 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd* 477 F. 2d 1292 (8th Cir. 1973).

[174]Mark A. Kadzielski, *Title IX of the Educational Amendments of 1972: Change or Continuity* 6 J. L. Educ. 2 (1977), at 200.

[175]*Id.* at 201.

[176]Ritacco v. Norwin School District, 369 F. Supp. 930 (W.D. Pa. 1973).

a case involving a woman's right to tend bar; there the court acknowledged the Supreme Court's refusal to award women suspect status, but said it would regard sex discrimination as suspect nevertheless.[177] However, even the most liberal justice would have been able to see the irrelevance of such an argument if stretched to apply to all interscholastic athletics. In *Sail'er Inn* it was shown that women can perform bartending duties as well as men and that the job is not unduly dangerous as far as sexually inspired attacks and advances are concerned.[178] The right to tend bar in an all women's bar was not at issue, nor were the circumstances concerning the difference in physical characteristics similar. In one the physical differences which evoke sexual attraction are involved and in the other, differences of relative strength, size, and stamina are at issue. Despite the understandable judicial timidity exhibited in these cases, a recent Ohio District Court broke all tradition and ruled that girls are eligible to play on teams with boys even in contact sports such as football.[179]

In addition to judicial equivocation, many women and girls themselves range from apathetic to reactionary in pressing for rights

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[177] Sail'er Inn v. Kirby 5 3Cd 1, 485 P 2d 529 (1971) at 363.

[178] *Id.*

[179] 46 U.S.L.W. 2372 (Jan. 24, 1978) U.S.D.C. S. Ohio; Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Asn., 1/9/78. "[T]o the extent it [Title IX] authorizes recipients of federal aid to deny physically qualified girls the right to compete with boys in interscholastic contact sports, Subsection (b) of 45 C.F.R. 86.41 is violative of the Fourteenth Amendment and must be held to be unconstitutional."

within this pluralistic group. While Blacks had a clear case of suspect status and state action to invoke the equal protection clause in addition to raising issues of sociological, psychological, and educational harm, the women's issue is mixed on all of these factors. Congressional debates on Title IX of the Education Amendments of 1972 reflected this public ambivalence about sex discrimination. However, representatives of the people surveyed before enactment agreed new legislation should assure that merit, not sex, should be the criterion for participation in activities using federal support.[180] Title IX generally covers three areas in educational institutions: admissions, treatment of students, and employment. Treatment of students is the area of most activity in public school questions of equality of educational opportunity. The sex discrimination litigation over athletic disputes and the cases involving higher academic qualifications for girls not only won official recognition of girls' rights to equal educational opportunity, but more important, increased awareness of sex discrimination in non-litigated areas. While offering official recognition of the right to such opportunity in the sex discrimination cases litigated regarding more rigid requirements for girls, and in athletic disputes, the influence it has exerted in nonlitigated areas is perhaps as important. The conscious actions of school officials to mix membership in formerly single-sex classes has been productive for both boys and girls, helping to eradicate the myth of language arts as sissy and science and mathematics as masculine disciplines. In addition, two

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[180] Kadzielski note 174 *supra* at 188.

of the departments where sexual identification was most extreme--home economics and industrial arts--were conspicuously obligated to become coeducational with their long history of federal aid. Because of disagreement of competing factions and free speech considerations, textbooks and curricular materials were deliberately exempted from Title IX provisions.[181] However, bringing this problem to the attention of local boards and textbook manufacturers has effected much improvement.[182]

Sex-related discrimination against married or pregnant students has not recently engaged judicial sanction. Where the state has undertaken to offer education or make it compulsory during the ages in which students might be either married or pregnant, courts have in recent years asserted that such students have a constitutional right under the equal protection clause to attend regular classes with other students. In addition, in *Davis v. Meek* the court cited the *Brown* decision in ruling that married students (a boy) were entitled to equal treatment in all aspects of education of which extracurricular activities were an "integral part."[183]

Women, as a pluralistic group, lack the cohesion of a common

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[181] *Id.* at 192-93.

[182] *Education and the Law* at 1423. *But see* Kodzielski, *id.* who states that in his 1977 review that "efforts to eliminate sex stereotyping in texts and materials are well underway in the courts," 192-3 n. 34.

[183] Davis v. Meek, 344 F. Supp. 298, 301 (N.D. Ohio 1972). *See also* Ordway v. Hargraves 323 F. Supp. 1155 (D. Mass. 1971); a court here ruled that a pregnant girl could not be prevented from attending classes during the school day, and made instead to come after hours to do her classwork. *But see* Kirp, Law and Politics, *supra* distinguishing Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973) which cited *Rodriquez* to argue that limiting a pregnant girl to night school was not exclusion, but an example of the state's minimal offering.

interest, a characteristic of other pluralistic groups seeking relief. Women's first interests are often as Jews, Blacks, Indians, Hispanics, White middle class, White working class or affluent Whites first and as women second. Pressing for interests of the ethnic or social class groups they represent is more attractive to many women, because such activity does not present the threat to family life presented by a militant woman's rights stance; women often have closer family or employment ties to men than to other women. Additionally, most sex discrimination questions involve limited access, rather than outright exclusion, and may thus seem like less important issues. Many women do not recognize or do not have any interest in sex-based education policies, and others desire to have nothing changed.[184] Thus even though women are not a minority in numerical terms, but rather "a majority of the majority," the priority they give to other pluralistic interests and their lack of commitment to the issue of educational sex discrimination tend to dissipate their influence.

In the case of litigation it is generally easy for justices to rule in women's favor because the pluralistic political sub-unit (district) can handle the remedy easily, and can, in most cases involving pregnancy, marriage and vocational classes offer no reasonable argument--often not even cost--for not complying. In athletic questions cost may be an issue, but local officials cannot morally justify spending on one sex and not the other. In the case of legislation promoting equality in education for sexes, the cost issue again helps

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[184] See Yudof *supra* at 493-95 for a discussion of this bifurcation.

to assure relief for women; new government funds need not be expended, since the responsibility for remedy lies within the local district; the fact that local control and district boundaries need not be usurped, alternately simplifies federal intervention and makes it more palatable to the local political pluralistic sub-unit. Neither did the justices, legislators, and local districts have reason to fear the vast social upheavals caused by the remedies for racial discrimination.

Tracks Divide Races

Litigation involving tracking and special education represents requests by pluralistic groups for both access to and exemption from the specific means the educational system is using to inculcate community norms and a minimum scholastic ability. The Supreme Court, as in the example of sex discrimination, has not been involved in tracking or special education cases, which may at first seem surprising since the landmark decisions involving tracking, excess placement in special education, and exclusion from publicly supported special education were in favor of Black plaintiffs. However, the culpability of school officials was so patently obvious that local, state, or federal political units were willing to supply the type of relief requested. But despite both the official endorsement and the pervasiveness of the relief manifested in these interpretations of equality of educational opportunity, some doctrinal questions are still unanswered.

Hobson v. Hanson, although not a Supreme Court case, is unique in that it established precedents in two important types of

educational inequality--within-school tracking and intra-district funding disparities.[185] The tracking question is actually a variety of segregation case in the tradition of the Southern school districts described *supra* who deliberately designed desegregation plans that wouldn't work. *Hobson* has been aptly termed a resegregation case. At issue was a tracking system in the District of Columbia schools which sorted students into low, regular, and high tracks. The regular track was vocational and the high track was college preparatory. In schools with few high ability students, no high track was scheduled. School officials claimed low tracks were designed to provide remediation to spur student movement to the regular track, although teachers of these classes lacked both training and experience. Students in the regular track were theoretically allowed to advance to the higher track, but, in practice, they were thwarted by a lack of prerequisites. Actually, statistics showed that students were locked into the track they started in by virtue of these and other built-in mechanisms. Students without kindergarten training automatically began in the low track where reading readiness began while other first graders progressed in actual reading. This partial summary of an ability grouping system would cause anyone to question the motives of such a program and the ability of the administrators in operating it. However, the tracking program was initiated only after Washington schools had been forced to desegregate. With this knowledge one is not apt to be so critical of the ability of the administrators to operate a successful program--since

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[185] Hobson v. Hanson, 269 F. Supp. 401 (D. D.C. 1967). The funding disparity question will be treated in Chapter IV *infra*.

the goal was to find a way to segregate the races in a desegregated school. This was accomplished admirably. Low tracks were almost exclusively Black, high tracks almost exclusively White. In schools with high Black enrollment, no high track was available, so the resegregation accomplished a second goal--that of effectively guaranteeing second class preparation for second class citizenship.

Questions arose in the trial concerning culture-biased testing for incorrect track placement, the irrevocable nature of track placement, the lack of compensatory education, and the deleterious effect of racial versus socioeconomic background on Black children's ability. The remedy was simple; the track system was ordered abolished because it excluded disadvantaged students from being in, or ever getting into, the mainstream. Justice Wright pronounced that "any system of ability grouping which . . . fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters a constitutional bar."[186] This ostensibly unarguable position is misleading, however. First, it is unlikely that plaintiffs' evocation of the equal protection clause would have been successful without the racial factor. Whether other disadvantaged children's exclusion from the mainstream by state action would be unconstitutional is problematic. Second, that ability grouping is either harmful or beneficial is unclear; results of research on ability grouping are so mixed and inconclusive that it has been able to indicate only that using such a

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[186] *Id.* at 453.

system appears not to matter.[187] Third, it can be argued that a culturally biased test is appropriate for grouping students in an educational structure which purports to provide instruction in collectivist White middle-class tasks. To throw out such tests, while ignoring the fact that they are predicative of ability to function in the mainstream, is to skirt the real issue.[188] However, ability grouping which separates a racial or socioeconomic pluralistic group from the mainstream certainly puts off progression toward the other collectivist goal of socializing students in majority norms. Thus, besides spurring subsequent desegregation guidelines which circumvent resegregation, the case has produced a skepticism about the presumed necessity of the commonly accepted administrative convenience of ability grouping.

In Hobson we have the incongruous situation where the court and the pluralistic interests of the Black plaintiffs in the interest of pluralism denounced the instrument which measures the inability on which they base their claims for compensatory programs. On the other hand, the collectivistic roles of education which have been advanced by the White middle-class are subverted by their own actions to keep a pluralistic group from being socialized in the melting pot which they themselves have always advocated.

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[187] See Alfred Yates, Grouping in Education (Stockholm: Almqvist Wiksells, 1966). The author, Yates, and the international survey of recognized research covered make such a generalization inescapable.

[188] See Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. Pa. L. Rev. 705 at 758.

Help for the Handicapped: A Racial Impetus

The litigation that laid the groundwork for the Education for All Handicapped Children Act of 1975 is similar in some respects to the *Hobson* tracking by ability case. Again the presence of Black litigants is the factor that assured litigation of the cases. *In P. v. Riles*, a case involving alleged incorrect placement of Black students in special education classes (Educable Mentally Retarded) on the basis of culturally biased I.Q. tests, Justice Peckham asserted, "Of all the evils the equal protection clause was designed to eliminate, racial discrimination is the one we are most certain the drafters contemplated."[189] The remedy called for a full evaluation of the student based on numerous factors, a full description of the program to be instituted to meet the child's special needs, and the consent of the parents.[190] The Justice thus shifted the burden of proof--as is consistent with a suspect classification--to the officials making the placement away from the plaintiffs who had, in making the complaint, had to prove the child was placed incorrectly.[191]

In contrast to the *Hobson*-*P. v. Riles* type relief for over-inclusion--two other landmark cases, *Mills* and PARC, involve demands for educational treatment beyond the traditionally offered curriculum.[192] *In Mills*, again a District of Columbia dispute, plaintiffs who

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[189] P. v. Riles, 343 F. Supp. 1306 (N.D. Calif. 1972) at 515.

[190] *Id.* at 1309. [191] *Id.* at 1314-15.

[192] Mills v. Board of Education, 348 F. Supp. 866 (D. D.C. 1972), and Pennsylvania Association for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

were exceptional children had been temporarily or completely excluded from all publicly supported education and were placed on a waiting list for tuition grants so that they could attend schools suited to their needs; in the suit they requested education in regular classrooms with supportive services or in special classes adapted to their needs.[193] Of PARC, Professor Thomas Gilhool, attorney for the plaintiffs, said the court ordered "zero-reject education--access to free public schools for all retarded children, whatever the degree of retardation or associated handicaps." He added that "Of 15,000 previously out-of-school children admitted, some 52% were only mildly or moderately retarded." There was to be an appropriate program for each child based on a "presumption in favor of the most integrated, most normalized program; that is, a regular class, including a regular class with resource room instruction, be preferred to a special class in a segregated school, and so on down the list of less integrated, less normal programs and settings."[194] This policy has become famous as the system of least restrictive alternatives.

Justice Waddy cited *Brown* in *Mills* to show that the plaintiffs had a right to a state supported education and contended that the state's interest in educating exceptional children is more important than the cost--no matter how much it reduced the per pupil expenditure for others.[195] Similarly, Gilhool cites the passage from *Brown*

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[193] *Id.* at 866.

[194] Thomas K. Gilhool, *Changing Public Policies: Roots and Forces* 2 Minn. Educ. 2 (1976) 8 at 10.

[195] *Mills*, 348 F. Supp. 866.

suggesting that the policy of segregation itself is a stigma, "The classifying criterion in each case--race and handicap--is visited accidentally and immutably upon them and the injury suffered from separation, even if all other things were equal, is the same."[196] Here, of course, Gilhool is making a case for suspect classification for the mentally and physically handicapped, a classification that so far has not had the official stamp of the Supreme Court. For this particular class Betsy Levin's popular list of questions for suspectness poses real problems:

1. Does the class have an immutable characteristic?
2. Has there been a history of invidious discrimination against the class in question?
3. Is the class a discrete and insular minority?
4. Is the class politically powerless?
5. Does the classification stigmatize members of the class as inferior?[197]

Some questions are inappropriate; for various types of handicaps answers would differ. Performance is involved with handicaps; in that respect it is not always an arbitrary classification as is race. Furthermore, in *Mills* the immediate reason for exclusion for four of the seven students was disciplinary, rather than the handicapping factor.[198]

These special education decisions present many troubling issues. In 1973 a New York court upheld the state when it contended that a

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[196] Gilhool, *supra* at 11.

[197] See Betsy Levin, *supra*, note 49 at 34.

[198] 348 F. Supp. 866; the extension of "due process" rights now under the Fifth Amendment granted in PARC and *Mills* and in other cases for normal children makes it extremely difficult to exclude any student from public education.

school board is not required to maintain classes which result in mere custodial care for retardates who cannot reasonably be expected to profit from education of any type.[199]

There does not appear to be a constitutional basis for providing an education suited to the needs of each child. Three years before PARC and *Mills*, *McInnes v. Shapiro* held that "There is no constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts."[200]

A year after PARC and *Mills*, *Rodriguez* reiterated the impossibility of litigating the needs issue, and held that the state's system of financing passed muster if it provided minimum access for all students.[201] Both *McInnes* and *Rodriguez* were High Court cases while PARC and *Mills* were not. This brings up another problem; the needs theory in *McInnes* and *Rodriguez* was advanced largely on the apparent disadvantage caused by socioeconomic factors. Is constitutional help assumed for disadvantages caused by innate differences (the suspect, immutable trait)? This could account for lower court approval of the needs approach in cases involving the handicapped.[202]

Some claim the needs approach guarantees a program appropriate

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[199] N.Y. State Assoc. for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D. N.Y. 1973).

[200] McInnes v. Shapiro, 394 U.S. 322 (1969).

[201] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[202] *See* Goldstein *supra* at 729-30 for other views and further expansion on this and other issues.

to the abilities of the gifted child. This seems unlikely since unlike handicaps, the immutable trait has not caused a history of suffering, a stigma of inferiority or political powerlessness, much less a functional exclusion or even lack of access to the conventional educational program.

Kirp asks, "Can the autistic child demand that $10,000, ten times the average per pupil cost, be expended annually on his or her education?"[203] This is the seminal question in granting equality of educational opportunity for the handicapped. Justice Waddy's assertion in *Mills* that the state's interest in providing everyone (no matter what the cost) with an education despite the effect of such a policy on the total budget suggests different priorities than Kirp's remark.[204] However, litigation prompted by pluralistic interests in achieving more meaningful education for the handicapped, or some education where there had been none, provoked an awareness among school authorities, scholars, politicians, and the community that something had to be done to help; few would deny that help was needed. Although the impetus came from a disadvantaged minority, the cause became a highly respectable one because handicaps are distributed throughout all social classes, although not always openly discussed. Women connected to the powerful, such as the Kennedys and Humphreys, lent financial and political support because of the presence of a handicapped family member. This consensus produced both state and federal legislation.

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[203] See David L. Kirp, *Law, Politics, and Equal Educational Opportunity: The Limits of Judicial Involvement*, 47 Harv. Educ. R. 2 (May 1977) 117 at 131.

[204] Note 195 *supra*.

State outlays increased from $900 million in 1972 to $2.03 billion in 1974, while the Education for All Handicapped Children Act of 1976 authorizes the federal government to spend $2.243 billion by 1979, as much as is expended at present on any federal educational program. Kirp contends that *Mills* and PARC did for special education what *Serrano* achieved for poor school districts--spawning suits in many states and increasing popular and scholarly awareness.[205] They did even more--by making the federal government pick up the tab.

The interests of the pluralistic group of handicapped are themselves pluralistic; the various types of handicaps--physical, emotional, mental--are broken down into further categories by the degree of the disability. They demanded either a chance or better chance at meeting collectivistic goals of education. Although the rationale of being able to vote as a reason for literacy did not always apply, training in appropriate skills to make them better and more useful citizens did--particularly to those who had been excluded. The goal of socialization was the main thrust of those who had been segregated within or outside the school. And, as with other examples of segregation, separate was often unequal. Entry into the mainstream would provide visibility not only for the handicapped, but for the educational treatment they would be receiving.

Pluralistic political sub-units (school districts) have little

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[205] See Kirp, *supra* at 135 citing *Congressional and Administration News* 1425, 1462 (94th Cong. 1st Sess. 1975), and at 130 for *Serrano* comparison.

reason to resist the push for equality of educational opportunity for the handicapped; there is no threat to local control or the present system of financing and no organized community resistance as with desegregation. The dumping of dollars into district coffers from state and federal sources enables local officials to please their clients while preserving their solvency. Sociologist Dan Lortie, however, sees this as a symptom of a "particular pathology of American education." Referring to this as the "oversell and underdeliver syndrome," he sees that the current distrust of educational institutions stems from "the gap between the rhetoric of promise and meager results."[206]

Resistance to equality of educational opportunity for the handicapped does not typically emanate from a disagreement in the principle involved; rather it is based on a distaste for mixing atypical students with so-called normal students who have traditionally monopolized the mainstream. This reaction is verbalized in statements expressing fear that classroom disruptions will subtract teacher and learning time from regular students.[207] Despite such dissatisfaction loss of mainstream enrollment would be minimal, however, compared to that prompted by desegregation--since flight to another district would not solve the problem. Sociologist Lortie is skeptical about the mainstreaming venture because of teacher attitudes regarding the

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[206]Dan C. Lortie, *Discussion*, 2 Minnesota Education 2 (1976) 16 at 17.

[207]Philip H. Mann, *Mainstreaming: An Evolutionary Concept of Mutual Responsibility*, Shared Responsibility for Handicapped Students: Advocacy and Programming, ed. Philip H. Mann (Coral Gables, Fla.: Univ. of Miami Training and Technical Assistance Center, 1976), at 36.

sanctity of subject-matter, the atypical student, and the extra work involved if no extra resources are provided. He says the insularity of the classroom--the unit of the cellular organization found in most schools--works against school-wide change. Because of this isolation Lortie claims chances for segregated special education classes are no better.[208] Both skeptics like Lortie and advocates of more special education and mainstreaming see the necessity of teacher and administrator training as well as program evaluation if the handicapped are to realize the real rewards of the equality of educational opportunity recently granted them.[209]

Language and Functional Exclusion

In the foregoing requests for equality of educational opportunity, the plaintiffs represented girls, tracked students, misplaced low ability students, retarded and handicapped students excluded from education and also all those desiring mainstream education. They were granted relief through lower courts, federal legislation, state legislation and both court-inspired or voluntary implementation of new policies at the local level. All sought relief under the equal protection clause of the Fourteenth Amendment, but implementation and enforcement of the remedies came largely through government funds, laws, and regulations.

The request for instruction in a foreign language for non-English

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[208] Lortie *supra* at 17. For an expansion of this concern, see Lortie, School teacher (Chicago: University of Chicago Press, 1975).

[209] *See generally* Lortie, *id.* and the volume Mann edits, note 207 *supra*.

speaking students is basically different from the requests of groups traditionally excluded or allowed only limited access. Instead of claiming to be victims of unequal treatment, plaintiffs in San Francisco in *Lau v. Nichols* claimed that by being treated exactly like everyone else they were suffering discrimination.[210] In *Serna v. Portales* 1972,[211] because of the very similarity of the programs offered to English and Spanish speaking students, a lower court also found that a violation to the latter's constitutional right to equal protection existed. Strangely enough, *Serna* was decided three years after *McInnis v. Shapiro*[212] where the needs issue was rejected by the Supreme Court, and *Lau* was the first educational decision made by the Supreme Court after dismissing the needs argument in *Rodriguez*. (The *Lau* remedy was more easily granted because it did not threaten district autonomy and traditional state methods of financing education.)[213]

Because of the language barrier the Supreme Court found the *Lau* plaintiffs victims not of actual exclusion, but of functional exclusion. Additionally, the Supreme Court in granting the relief hesitated, however, to extend the doctrine of constitutional equal opportunity, resting its decision instead on the Civil Rights Act of

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[210] Lau v. Nichols, 411 U.S. 563 (1974).

[211] Serna v. Portales, 351 F. Supp. 1279 DNM (1972).

[212] McInnis v. Shapiro (Ogilvie) 394 U.S. 322 (1969).

[213] San Antonio Indp. School Dist. v. Rodriquez, 411 U.S. 1 (1973). The countervailing issue of district autonomy will be explored in Chapter IV *infra*.

1964.[214] The Act as interpreted by the Department of Health, Education and Welfare stated: "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[215] HEW specified also that recipients of government aid may not:

> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
> . . .
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program. . . .[216]

The school district's summary of its arguments indicates, perhaps, the Supreme Court's reasons for steering clear of the equal protection issue. The defendant school board had cited precedents stimulated by *Brown* as reasons for not being obligated to provide relief.

> The decision to conduct public education in English is reasonably related to the legitimate purpose of providing general education to the population. The fact that some residents cannot understand or speak English does not render that decision capricious or arbitrary. Just as there is no fundamental right or suspect classification, there is no basis for compelling affirmative action to remedy disabilities for which the state cannot properly be held accountable. In the instant case, the

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[214] 56. 42 U.S.C. § 2000d (1970).

[215] Memorandum dated July 10, 1970, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11595 (1970).

[216] 57. 45 C.F.R. § 80.3(b)(1) (1973).

> petitioners' disabilities are caused by the accident of birth and are not related to any district policies. The Court has refused to abolish the distinction between de facto and de jure segregation, and likewise absent intentional discrimination, no affirmative action may be compelled in the instant case. The Fourteenth Amendment does not impose a duty on states to equalize differences between citizens.[217]

Non English-speaking students, nevertheless, gained the right to bilingual instruction. The implications of Justice Douglas' arguments for this form of compensatory education in *Lau v. Nichols* are interesting to contemplate. He sets the stage for both access to, and exemption from, the two collectivistic goals of education--competence in the basic academic skills and socialization in majority norms.

> Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, text books, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.
>
> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.
>
> Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.[218]

In the first statement in saying that students who do not know English "are effectively foreclosed from any meaningful education" Justice Douglas appears to be condemning mere custodial care as meeting the state's requirements in offering a minimal education. Tyll Van Geel

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[217] Brief for Respondents at 8.

[218] 411 U.S. 563 at 788.

speculates that because of this bilingual mandate, other classes of children may seek such relief because they bring to school with them a dialect of English which makes instruction in the dialect of the dominant culture ineffective, or even useless. He feels however, that the claim of Black students contains inherent obstacles since:

> The *Lau* decision suggests that a particular group of children must share the following linguistic characteristics if a court is to force a school system to provide them special instruction in English:
>
> (1) Their language behavior is not caused by mistakes, laziness, of cultural deficiency, rather it reflects a complete language system with its own lexicon, rules of pronunciation, and grammar.
>
> (2) This language system is structurally different from English.
>
> (3) These children are not understood by monolingual English-speaking teachers. Prejudice or bias against the language leading to an unwillingness on the part of the teachers to attempt to understand their pupils is not a factor.
>
> (4) Their inability to comprehend results in their absolute exclusion from effective participation in schooling.
>
> (5) The language used by the pupils has been associated historically with their culture, ethnic background and race.
>
> (6) In order to learn English, these pupils would have to learn a new vocabulary and a new set of rules covering pronunciation and grammar. Special pedagogical techniques would be needed.[219]

Despite these obstacles Van Geel maintains that help needs to be found for students from cultural backgrounds in opposition with the official culture promoted by the school.[220] McCarthy, however, contends that any disadvantaged students who cannot benefit from a mainstream program, could conceivably under the *Lau* ruling, have a valid claim to an educational program designed to meet their needs.[221]

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[219] See Tyll Van Geel, *Right to be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans*, 25 Syracuse L. Rev. 836-910 (1974).

[220] *Id.*

[221] McCarthy *supra*, Equal Protection Clause 178.

Justice Douglas' second statement makes it clear that the purpose of bilingual instruction is to correct a deficiency in the use of the English language in order that the mainstream program will eventually be profitable for the foreign-speaking students. However, both the efficacy of bilingual instruction itself and the purpose of the program are open to question. Millions of foreign-speaking immigrants to the United States learned English in and out of schools by the sink or swim method to hasten progress toward the melting pot. For decades public education chose this method to Americanize its students.[222] Coons criticizes the Supreme Court for not availing itself of "professional knowledge about the potential or actual injury at stake" and the alleged danger of "thrusting such children into the normal curriculum." Coons underlines this incredulity by a personal experience: "At the time *Lau* was decided my four children who spoke only English were enrolled in the local schools of a foreign country, and until the Court's opinion, they were considered blessed for the experience."[223]

Bilingual programs have, in the eyes of many, purposes other than the official one of rapid entry to the English speaking mainstream. Programs advocated for both ghetto Blacks and Spanish speaking minorities include minority cultural instruction and recognition and practice of accompanying values and customs. The purpose of such programs is not only to make minorities less ashamed of their background, but also for

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[222] See Lortie note 206 *supra* at 16.

[223] Coons *supra*, *Recent Trends in Science Fiction* at 30.

perpetuating pluralistic differences.[224] Van Geel sums up the problem, which has vast implications beyond the mere learning of English:

> The pressure from home is towards maintaining the family's cultural identity. The pressure from school is towards dilution of that identity. Thus, not only is the student pushed to shed his mother tongue which is denigrated as an inadequate version of, for example, classic Spanish, but also he must cope with the school's concept of the proper sex roles in a family; the proper anglicized pronunciation of his name; the proper foods to eat; the proper attitude toward nudity (an issue which arises in athletic programs); the proper attitudes toward time, punctuality, fate, achievement, competition, work, and authority; and the proper modes of dress, hair care, and health habits.
>
> The impact of this conflict upon the student can take many forms. First, the student may be forced into making a choice between rejecting what the school has to offer and viewing English as the language of an alien culture, and even of the oppressor, or rejecting his parents and home culture. If the student rejects the school he may drop out, but this is only one possible form of escape. Students also withdraw into themselves, become passive. . . .[225]

Indeed, modern linguistic research suggests that doing school-work in a second language may impair children's conceptual development:

> If concepts are to be meaningful at the children's maturational level, the language for communication of the concepts to and among children is crucial. When the language is foreign, children may mimic adult concepts without any appreciable contribution toward their own conceptual growth. If they can not express the ideas or discuss them with their peers, conceptual growth may be stalled or impaired.[226]

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[224] *See generally* Van Geel, note 215 *supra* and Clark S. Knowlton, *The Special Education Problems of the Mexican-Americans*, The Conditions for Educational Equality, ed. Sterling M. McMurrin (Lexington, Mass.: Heath Lexington Books, 1971), 142-80.

[225] Van Geel *supra* at 871.

[226] G. Omani Collison, *Concept Formation in a Second Language: A Study of Ghanaian School Children*, 44 Harvard Educ. Rev. (1974). Many developing nations use a foreign language as the medium of instruction in elementary school. This study uses Lansdown's approach to Vygotsky's theory of language and concept development as the basis for comparing the conceptual level Ghanaian children express in their native languages (Ga or Twi) and in their school language (English). The children manipulated and

Bilingual instruction has become the source of controversy in lay as well as scholarly circles; in an article entitled *Debating the Uses of Bilingual Instruction*, Time magazine states:

> The degree of emphasis on English differs markedly from program to program.
>
> So-called transitional programs shoot their students into regular English-speaking classrooms as quickly as possible. Under a second technique, called the maintenance method, rapid mastery of English is still the goal. But students continue studying their own culture and language. A third approach, being tried in areas with large Hispanic enclaves, such as New York, Florida and Southern California, is bilingual and bicultural: the programs encourage native-born Americans to achieve fluency in a foreign language even as their counterparts are learning English.[227]

Time contends the bilingualism may lead to a variation on White flight and separatism:

> Meanwhile, in Miami, Spanish is threatening to swamp English completely. Bilingual educators warn that if English-speaking high school graduates want jobs in the area, they will need Spanish as much as immigrants from Cuba will need English. Native-born Americans, reacting against the Spanish tide, are abandoning Dade County. That has led even advocates of bilingual teaching to wonder if old-fashioned assimilation was not a better policy after all.[228]

Because of their increasing numbers and their geographic distribution, Hispanics have become a political and consumer bloc to reckon with according to a recent editorial writer. He maintains, "Among the

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then discussed specially chosen science materials. By scoring and counting the untutored statements of the children, the author was able to conclude that children function at a higher conceptual level in their vernacular than in English.

[227] *The Three Rs in 70 Tongues: Debating the Uses of Bilingual Instruction*, Time, February 13, 1978 at 65.

[228] *Id.*

objections of the Hispanics is one no immigrant group has heretofore been strong enough to demand--the right to their own language."[229]

It would appear, however, that in the *Lau* case, the affirmative ruling could also be attributed to the ease of the remedy. School districts could implement the remedy internally, despite difficulties of finding enough qualified teachers. Federal and state assistance in the form of planning and funding both became available as a result of legislation and the creation of a federal office of Bilingual Education which sponsors seven-hundred programs in forty-one states and five territories costing one hundred thirty-five million.[230] Any reluctance that did exist at the time of the *Lau* ruling in 1974 on the part of the school district would appear to have dissipated if the following incident in St. Paul is representative. It was discovered just as school started that children of fifty families in a University of Minnesota housing area should attend school in the City of St. Paul instead of suburban Roseville; they had been attending there because of district officials' previous misreading of a boundary line.

> Forty per cent of the families in the development are from foreign countries (a parent noted).
>
> Many of them require special language training for themselves and their children, which the Roseville school district has developed over the years. She claimed that St. Paul would not be able to provide those language services to the wide range of nationalities represented at Commonwealth.
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> St. Paul Schools Supt. George Young, however, disagreed. He

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[229] *Hispanics and Politics*, editorial, St. Paul Dispatch, Dec. 31, 1977, at 5.

[230] ESEA Title VII Bilingual Education of 1974; statistics, See Time note 227 *supra*.

said St. Paul's TESOL program (Teaching of English To Speakers Of Other Languages) is adequate to handle the Commonwealth children.

The board was unimpressed by the arguments of suddenness, special need, and community cohesiveness. Their position was summed up by board member James Griffin: "If they live in St. Paul, they go to school in St. Paul."

The Commonwealth children will bring about $50,000 in additional state funds to the school district.[231]

Equality: The Countervailing Interests of Collectivism and Pluralism

The request for language instruction for students whose mother tongue is not English was launched and granted to promote the collectivistic aim of gaining competence in basic academic skills--which thus takes on a more specific definition, literacy in the English language. It is ironic that it was necessary for the Supreme Court to rule on the importance of literacy in English--the *raison d'etre* for public education during a time when wave after wave of immigrants hit America's shores. At that time, the practice of thrusting students into the mainstream was deemed the most efficient way of homogenizing foreigners.[232] The Court's ignoring of history by mandating special language instruction may amount to tacit recognition of a growing contemporary demand, however, for the right to cultural pluralism. It is thus worth noting that those in classifications based on sex, ability and handicaps were, through a variety of means, seeking quicker access to the mainstream of American life. The Supreme Court, interestingly, did not rule in any of those requests even though many

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[231] *Parents' School Request Denied*, St. Paul Dispatch, Sept. 7, 1977 at 33c.

[232] See Lortie note 206 *supra*.

exhibited racial overtones. It is a measure of the importance of the *Lau* decision, then, that the High Court--despite its dismissal of the needs philosophy in *McInnis* and *Rodriguez*[233]--specified a remedy for foreign speaking that ostensibly had a collectivist goal, but was certain to perpetuate pluralism and cultural diversity.[234] After twenty-three years of litigation to give students equality of opportunity by desegregating, eliminating tracks, and temporizing separate special education, a remedy that was certain to create both tracks and segregation within the school was ordered. So evident was this separatist consequence that school officials required Anglos to study foreign language and culture in a desperate act of reverse socialization.[235] Harm was established by equal treatment, so it followed that that type of equality became inequality and equality of educational opportunity thus had acquired a new direction. The court, to be sure, noted the ostensible Americanization purpose and the imminent danger of separation,[236] but with the mounting evidence that Spanish speaking Native Americans, and some Blacks did not wish to become Anglicized--much less abandon their own cultures--the epidemic application of the decision should have been predictable. While the relief for lack of access in sex-discrimination, tracking and handicapped requests represents the tendency for courts to be more aware of violations of rights to socialization, their acknowledgement

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[233] 394 U.S. 322 (1969) and 411 U.S. 1 (1973).

[234] See note 218 *supra*.

[235] See Time note 227 *supra*.

[236] See note 218 *supra*.

of the countervailing interests of pluralism--parents, neighborhoods, communities and cultural enclaves--is evident in the bilingual remedy.[237] The deference to parental and community pluralistic interests as a trend in desegregation remedies is thus extended to other requests for equality of educational opportunity. According to Hooker, the courts, in a more temperate mood, are converting from the stick to the carrot approach in desegregation orders to get local districts to implement their decisions; this trend is manifestly observable in the special education and bilingual decisions where state and federal legislation and money have served as the carrot to tempt financially-strapped pluralistic political sub-units into extravagant programs they could not otherwise afford.[238] Indeed, the very power structure of the local district appears to be changing. The classic Anglo professional staff, central administration, and school boards are becoming pluralized as a very result of the extension of equality of educational opportunity to pluralistic interests. Indeed, the adversary role adopted by local officials toward plaintiffs in the past, will through these internal changes perhaps be diminished.

It would seem that the nine famous definitions Wise delineates of equality of educational opportunity are capable of only limited

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[237] A trend noted in Education and the Law; *see* note 71 *supra* and Hooker, *see* note 165 *supra*.

[238] Hooker, *id.*

application to the actual requests for such opportunity granted.[239] The definitions are so tied up with dollar and cents measurements that the importance of socialization--the main purpose of desegregation and mainstreaming--is omitted. E.g., "[E]quivalent forms of assistance in developing . . . abilities, wherever [children] live in a given state and whatever their parental circumstances are" a phrase from the negative definition has internal contradictions for the student in an all Black school district; despite the money spent, the benefits of the mainstream elude such students.[240] "[F]ulfill his potentialities," "achieve the best that is in him,"[241] and "diminish differences" are phrases that deny the existence of preferences for cultural diversity and new measurements for "success."

But finally, the brilliant record of groups recounted in this chapter in getting courts to order remedies for a myriad of types of unequal educational treatment can best be summed up by Mary McCarthy in her study of the viability of the equal protection clause to effect educational reform:

> The judiciary has seemed more assertive in striking down school classifications based on race, sex, marriage, ability, and other characteristics when there has been unmistakable injury to students and the proposed remedies have not disturbed the delicate balance of power between state and federal governments. On the other hand, the Court has seemed reluctant to

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[239] For an explanation and listing of the definitions see notes 8-17 *supra*.

[240] See note 9 *supra*.

[241] See note 11 and 13 *supra*.

uncover constitutional violations in desegregation and school finance cases if the remedies would interfere with the state's power to levy taxes and distribute funds or design its political subdivisions.[242]

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[242] McCarthy *supra* n. 109 at 178. This observation is the subject of Chapter IV, *infra*.

CHAPTER IV

DEFINING EQUALITY: THE BOUNDARY FACTOR

Interdistrict Desegregation

Splinter Districts Impede Equality

Desegregation, by the mid 1970's, had made headway in both North and South despite the lack of a cooperative mood on the part of the White majority. Court cases, statutes and regulations were necessary to bring many districts into compliance. Litigation typically involved two basic issues: finding a violation under *de jure* segregation and the district evolvement of a remedy acceptable to the court. However, during the desegregation process a mutant type case emerged which began to complicate one or both of these issues for the courts--the case turning on a district boundary issue. The splintering of a district once intact or the conglomeration of once individual districts, are two manifestations of the involvement of district boundaries in school desegregation quests for equality of educational opportunity. Although the plaintiffs in these cases complain of the injury of the inequality produced by state mandated discrimination, the road to relief has been checkered--a contrast to the virtual routine judicial relief granted in cases where boundaries do not intervene. The judicial affirmation or rejection of the plea depends instead on the *de facto* viability of the district lines and the

district location of the *de jure* violation.

In *Wright v. Council of Emporia* and *U.S. v. Scotland Neck*[243] the Supreme Court dealt with the constitutionality of attempts by school officials to create splinter districts. These actions were initiated after the original districts to which they had belonged had begun the process of dismantling a dual school system and establishing a unitary system. Both splinter attempts were rejected, but the decision in *Scotland Neck* was unanimous while *Wright v. Emporia* squeaked through on a five to four split. The dissenters--Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist--distinguished *Wright v. Emporia* because *Emporia* had been designated a politically independent "city of the second class" in 1967 at its own request.[244] Although it had shed its political and financial dependency as a town and thus part of surrounding Greensville County, Virginia, it had remained a part of the county school system. It had about an even number of Blacks and Whites, while in the rest of the county Blacks outnumbered Whites almost two to one.[245]

In both cases the court ruled that the splinter districts would impede the implementation of a unitary system, but in *Scotland Neck's* attempt to secede from Halifax County, North Carolina, the Court noted that the racial motivation was clearer since it had never been a separate political entity. There was no constitutional objection to the choice to create new districts *per se*, as is consistent

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[243] Wright v. Council of Emporia, 407 U.S. 451 (1972); U.S. v. Scotland Neck Bd. of Educ. 407 U.S. 484 (1972).

[244] Id. at 464. [245] Id. at 457.

with political pluralism. However, it appears that if the creation of such a district subverts progress toward the county unitary school system plan, the action takes on a *de jure* cast--even though both units planned to enforce the plan in their own district. These rulings add a subtle layer of meaning to the definition of desegregation. The whole Court in *Scotland Neck* and the majority in *Emporia* have gone beyond racial balance to requiring that the number of Whites in a desegregated school system be maximized either because they believe such a practice is a better application of the universalistic ethic or because it promotes a better learning atmosphere.[246]

Interestingly, a federal court upheld a remedy involving the combining of districts for purposes of desegregation because a suburb had been deliberately created to segregate Blacks in Missouri just after the Civil War.[247]

Metropolitan Remedy: Determining Culpability

Boundary-drawing which makes school districts smaller for the purpose of diminishing the effect of a unitary remedy plan has not enjoyed general judicial approval; similarly, attempts to expand the area in which the remedy is applied have not fared much better. In Virginia an attempt by plaintiffs to maximize desegregation by the inclusion of more majority students through a metropolitan remedy met with stern disapproval in a Fourth Circuit Court. The arguments of a better racial mix and a better learning and integration atmosphere

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[246] Kirp and Yudof, note 22 *supra* at 444-45.

[247] U.S. v. Missouri, 388 F. Supp. 1058 (E.D. Mo. 1975).

as spelled out by Dr. Thomas Pettigrew were used.[248] Although these arguments won the splinter district cases for the plaintiffs, they carried no weight against the sacrosanct district boundary in metropolitan cases. This is all the more ironic since here it is not a question of raising or lowering a Black majority by a few percentage points, but rather the case in which the futility of desegregating an all Black district is to be relieved by desegregating with two all White districts. In his opening remarks of *Bradley v. Richmond* Circuit Judge Craven asks and answers the crucial question:

> May a United States District Judge compel one of the states of the Union to restructure its internal government for the purpose of achieving racial balance in the assignment of pupils to the public schools? We think not, absent invidious discrimination in the establishment or maintenance of local governmental units, and accordingly reverse. . . . In his concern for effective implementation of the Fourteenth Amendment he failed to sufficiently consider we think a fundamental principle of federalism incorporated in the Tenth Amendment and failed to consider that *Swann v Charlotte-Mecklenburg Bd of Educ* 402 US 1 (1971), established limitations on his power to fashion remedies in school cases.[249]

Judge Craven does not apecify the absence of invidious discrimination in the form of *de jure* segregation, but rather the absence of "invidious discrimination in the establishment or maintenance of local government units." The districts of Richmond, Henrico and Chesterfield had all been a part of state sanctioned segregation, and all had an affirmative duty to correct past wrongs, but since district line drawing itself involved no segregative intent, even though it exacerbated the effect, such state action was held neutral.

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[248] Bradley v. Richmond, 462 F.2d 1058 at 1063.

[249] *Id.* at 1060.

A second reason was given for reversing the district court, although it is one of practicality rather than doctrine. The new school district would cover 750 square miles and serve 100,000 pupils.[250] Judge Craven adds, however, after prefacing the remark with the more weighty stated reason:

> But even if we were to ignore Virginia law, as we are urged to do, there are practicalities of budgeting and finance that boggle the mind. Each of the three political subdivisions involved here has a separate tax base and a separate and distinct electorate. The school board of the consolidated district would have to look to three separate governing bodies for approval and support of school budgets. . . .[251]

There are several circumstances in this case that give credence to the conclusion that the chance to preserve a white suburban enclave (such as exist because of *de facto* segregation in the North) is the controlling factor in this Southern case. (1) In the splinter cases, *Emporia* and *Scotland Neck* were forced to remain as parts of larger systems. *Emporia*, a city with slightly fewer Blacks than the county in which it was located, was forced to remain as part of the larger district despite its recognized political autonomy. (2) The largeness of the district pales somewhat as an argument, since *Swann* had had to submit to a desegregation plan involving 550 square miles and 84,000 students. That district had a Black inner city and White outlying areas, but the plaintiffs there had no boundary issue to advance.[252] It appears courts could overlook the sanctity of boundaries representing pluralistic intents when the racial proportions are not seriously

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[250] *Id.* at 1062.

[251] *Id.* at 1068.

[252] Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971).

altered, but perceives them as an insurmountable barrier when a real opportunity for preserving White separation occurs. It is unfortunate that the Supreme Court had split on this decision so that no opinion was written, and also that it was not litigated after *Milliken* so that the viability of boundaries surrounding districts with statutory *de jure* segregation could have been tested.[253]

However, it is the *Milliken v. Bradley*[254] decision that is generally blamed for setting metropolitan remedies back, since there was no precedent established by the split decision of the Supreme Court in the *Richmond* case. Because Northern *de jure* and *de facto* segregation alike--given the bullseye population pattern of the Northern metropolis, a Black inner city core surrounded by rings of mostly White suburbs--[255] had not been responsive to the single district remedy applicable to much of the South, egalitarians pinned their hopes on the metropolitan remedy advanced in the Detroit case.

The U.S. District Court for Eastern Michigan held that to desegregate Black Detroit fifty-three suburban school districts and their 503,000 students would be involved in busing along with 276,000 Detroit students to achieve a racial mix.[256] Suburban Whites who had fled the unsafe urban area stormed; they were outraged that municipal

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[253] Bradley v. School Board, 412 U.S. 92 (1972).

[254] Milliken v. Bradley, 418 U.S. 717 (1973).

[255] Kluger, *supra* at 772.

[256] Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970), *appeal after remand*, 438 F.2d 945 (6th Cir. 1971).

and school district lines could be so casually ignored and expressed conventional fears for the American concept of neighborhood and community schools.[257] The Court of Appeals in upholding the decision distinguished *Bradley v. Richmond* where a consolidation of three districts had been ordered: "In the instant case the district court has not ordered consolidation of school districts, but directed a study of plans for the reassignment of pupils in school districts comprising the metropolitan area of Detroit."[258] It went on to say that in Virginia the power to operate schools was vested exclusively in the local district, not in the state board of education and then pointed out another contrast: "The record in the present case amply supports the finding that the state of Michigan has not been subject to such limitations in its dealings with local school boards."[259]

But Chief Justice Burger, who wrote the decision for the Supreme Court in *Milliken v. Bradley*, did not split hairs over the consolidation-reassignment issue, nor did he demonstate the cavalier attitude toward the autonomy of local boards exhibited by the Appeals judge; to him any remedy reaching into innocent districts met a Constitutional bar:

> . . . it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an

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[257] Kluger, *supra* at 771.

[258] Bradley v. Milliken, 468 F.2d 902 (6th Cir. 1973) at 910.

[259] *Id.*

> inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy.[260]

Lower courts had found that District school officials had sanctioned policies which intensified segregation during the years the exodus to the suburbs accelerated. It has been argued that such segregation causes White Flight, and alternately argued that the threat of desegregation speeds it up more. When a school becomes integrated, some Whites remove their children by whatever means available, and the school soon becomes all Black.[261] Nevertheless, according to Mr. Justice Burger, a violation--in order to evoke a metropolitan remedy--must produce segregation in more than one district, which would mean producing additional Black, not White districts. Gary Orfield maintains that:

> Obviously the White flight question has great policy importance. . . . The most recent controversy had arisen over claims by James Coleman, perhaps the nation's best known sociologist, that urban desegregation is self-defeating because it merely speeds up the departure of a city's remaining White residents. Too often, selective, half-digested reports of preliminary research findings are disseminated by the media and become weapons in the intense political and legal battle being fought in major cities.[262]

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[260] 418 U.S. at 745.

[261] Kluger, *supra* at 771.

[262] Gary Orfield, *White Flight Research: Its Importance, Perplexities and Policy Implications* at 185 in Ashline volume, note 60 *supra*.

Orfield observes:

> The indications that the school issue, in itself, is not a sufficient explanation for White Flight can be found everywhere. If the changing racial composition of the public schools was the central problem, for example, one could expect a heavy increase in the enrollment of Whites in relatively inexpensive Catholic schools, schools which are heavily concentrated in central cities. They are real alternatives for many of the Catholic ethnic concentrations directly threatened by racial change. These schools, however, have declined sharply in enrollment in recent years.[263]

He also cites statistics showing that flight is not a one-race phenomenon. Black Flight has intensified in Chicago, Washington D.C., and Los Angeles, while San Francisco is experiencing both Black and Brown Flight, leaving a concentration of the minorities' lowest socioeconomic stratum to intensify urban problems.[264] He lists conditions existing in the late sixties and early seventies which influenced the rate of racial transition:

1. Record levels of housing construction, overwhelmingly concentrated in the suburbs
2. Major urban riots
3. Rapid continued movement of urban jobs to suburban facilities
4. Trend toward racial polarization in city politics and the emergence of Black political leaders
5. Increasing crime and public fears of violence
6. More rapid expansion of ghetto boundaries made possible by 1968 federal fair housing law
7. Increases in strikingly disproportionate central-city taxation in some areas
8. Decline in the actual level of central-city services in some cities
9. Housing subsidy programs of unprecedented magnitude which tended to accelerate racial transition in the city, create opportunities for lower-income Whites in the suburbs, and sometimes end with the elimination of thousands of units from the central-city housing stock
10. Major financial incentives, in terms of downpayment and financing, for young families to purchase new outlying suburban housing.[265]

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[263] *Id.* at 189.

[264] *Id.* at 189-90.

[265] *Id.* at 188.

Orfield remarks:

> The available research suggests that the first year of desegregation is a critical period for decisions to leave the public schools or move to another school district. This problem might be moderated by expansion of the small federal program providing special assistance for the transition, as well as strong leadership supporting compliance with the law.[266]

If that is the case, it could be argued that the segregative policies fostered by Detroit and other big city schools actually kept White Flight at a slower pace.

Although Orfield says that existing research on White Flight can support only limited policy recommendations he suggests that "if the pattern of flight is to be significantly modified, positive, coordinated, and, often, metropolitanwide desegregation efforts dealing with both housing and schools will be required."[267]

A Brown-type hole in the dike of residential segregation does appear to be developing. Ironically, the Supreme Court in a housing case distinguished *Milliken* because metropolitan relief in housing would *not* undermine the autonomy of political sub-units; whether such relief solves the problems of the inner city or merely spreads those problems to the suburbs remains to be seen. A *Saturday Review* article investigates the struggle being fought in Eastern United States suburbs against Housing and Urban Development (HUD) and the growing conviction among state judges "that the U.S. Constitution mandates an end to exclusionary zoning."[268] The author, Roger M. Williams, claims:

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[266] *Id.* at 197.

[267] *Id.*

[268] See Hills v. Gautreaux, 44 U.S.L.W. 4480, 83 April (1976), and Roger M. Williams, *The Assault on Fortress Suburbia: How Long Can the Poor Be Kept Out*, Saturday Review, February 18, 1978, 17.

> The fair-housing fight will take the racial struggle out of the schools and into the homes. Former president Richard Nixon, that master of middle-class homiletics, explained what is at stake: "Quite apart from racial considerations, residents in outlying areas may and often do object to the building in their communities of subsidized housing, which they fear may have the effect of lowering property values and of bringing in large numbers of persons who will contribute less in taxes than they consume." Nixon hardly had to mention the more obvious suburban fears: of crime, drugs, and cultural differences that are associated with the inner-city poor.[269]

If it is an attempt to socialize a low socioeconomic group in White middle-class values, fair-housing will run into the same stiff resistance that racial integration did. And according to Williams, "Forty percent of America, Harvard's Thomas Pettigrew notes, does not want Blacks of any class living next door. So 'spatial deconcentration of the poor,' as the planners call it, will be the hot issue of urban politics in the Eighties."[270] He quotes one housing activist who admits, "The biggest opposition to low-income housing comes from home-owners who work very hard just to survive. Our crazy system has taught us that it's godly to own a home and kill yourself doing it."[271] Williams supports this statement which obliquely underlines the insulation of the affluent who can afford to have liberal attitudes, saying, "As demagogic as he was, presidential candidate George C. Wallace was right in saying that working classes have been left to bear the brunt of our most demanding social changes."[272] Williams quotes a White Flight veteran, speaking for the suburbs who rages, "New York City Housing projects now are vast prisons with

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[269] *Id.*

[270] *Id.*

[271] *Id.* at 21.

[272] *Id.* at 22.

unruly tenants. Any refugee from the city does not want *that* coming after him. It's a gut reaction."[273]

If there is any hope that residential integration will solve the country's metropolitan school desegregation problems, much less its residential segregation problems, the words of an advocate of subsidized suburban housing will dissolve that: "The issue of housing the poor in the suburbs will make the desegregation of public schools look simple because the threat is more immediate than with the schools." Paul Davidoff, Suburban Action Institute President.[274]

The idea of escaping to the suburbs is based on the generally accepted notion of the autonomy of political and educational sub-units. The visible differences between city and suburb are protected by the indispensible invisible barrier--the city limits or the school district boundary. It is the latter type of barrier which makes Chief Justice Burger's dependence on the precise locus of the violation so important. Dworkin reveals the significance of this factor in the present litigated definition of equality of educational opportunity. He thus shows the weakness of the following syllogism by pointing out the importance of the *Milliken* distinction:

> Every child is entitled to an equal education opportunity. A segregated education, whether *de jure* or *de facto*, does not provide an equal educational opportunity. Therefore every child is entitled to an integrated education. If we wish to adopt this theory as a justification of the later integration cases, then we must ignore a part of the opinion in each case, namely, the part of the opinion that appears to say that no remedy exists for *de facto* segregation unless the district has been segregated *de jure*, covertly or openly, in the past. If every child has a right to an integrated education, then it cannot make any

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[273] *Id.* at 20.

[274] *Id.* at 24.

> difference whether a *de facto* segregated district was segregated *de jure* in the past. However, it was widely thought, before *Milliken v. Bradley*, that the requirement of past *de jure* segregation was so much window dressing, because the courts would, in effect, infer past *de jure* from present *de facto* segregation in every case.[275]

And *de jure* segregation could not be charged against the suburbs as long as the district boundary was sacrosanct under the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people."[276] But the question arises as to the status of setting school district boundaries--is the desegregation obligation imposed by the Fourteenth Amendment to be applied separately to each governmental unit?[277] Chief Justice Burger's answer to this question is best elucidated in his minority opinion in *Emporia*:

> It can no more be said that racial balance is the norm to be sought, than it can be said that mere racial imbalance was the condition requiring a judicial remedy . . . the goal is to dismantle dual school systems rather than to reproduce in each classroom a microcosmic reflection of the racial proportions of a given geographical area. . . . School authorities may wish to pursue that goal as a matter of policy, but we have made it plain that it is not constitutionally mandated. See *Swann v. Charlotte-Mecklenburg Bd of Educ 402 U.S. at 16.* . . . The discretion of a district court is further limited, where, as here, it deals with totally separate political entities.[278]

In *Milliken* he additionally acknowledges what appears to be the powers

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[275] Dworkin, note 101 *supra* at 7-8.

[276] U.S. Constitution, Amend. X.

[277] In cases where the deliberate setting of boundaries was accomplished to avoid desegregation the answer was, "No" as *Emporia, Scotland Neck* and *Missouri* indicate in the "Splinter District" section *supra*.

[278] Wright v. Emporia, 407 U.S. 451 at 473.

of "the people" in the Tenth Amendment when he says: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process."[279]

However, as logical as the arguments may seem to suburbanites, an alternate interpretation of the two amendments provided by Judge Winter in the *Richmond* dissent would be favored by Blacks trapped inside the city limits:

> The mandate of the Fourteenth Amendment, as spelled out in *Brown I*, is directed to the state of Virginia, not simply individually to its various subdivisions. The premise of the majority's statement is that each political subdivision is free to operate in its own orbit so long as it obeys the Fourteenth Amendment and does not undertake to conspire with others to defeat it. I do not conceive this to be the law; whether acting singly or in concert, action and inaction, by Richmond, Henrico and Chesterfield Counties in the several regards described are all *state* action and it is to overall state action that the Fourteenth Amendment is addressed.[280]

Milliken, might be distinguished, however, since Detroit suburbs had never operated under statutory segregation as the Southern suburbs had.[281]

Chief Justice Burger's interpretations of *de jure* segregation, segregative effect, and the precedence of local control, however, became Constitutional law and suburban districts were quick to respond. In Pittsburgh and Indianapolis White suburbs protested their innocence

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[279] *Milliken*, 418 U.S. at 742.

[280] Bradley v. School Board, 412 U.S. 92 at 1076.

[281] See text at note 253 *supra*.

and thus retained their immunity from a metropolitan remedy.[282] The city of Louisville, Kentucky and Jefferson County had merged for only twenty-four hours by court order when *Milliken* nullified the merger.[283]

Metropolitan remedies are not, however, impossible. Louisville and Jefferson County were subsequently merged by existing Kentucky state laws for consolidating school districts. The summer after the state had consolidated the district, the Sixth Circuit Court ordered the new district enrolling 120,000 students to desegregate in the forty days remaining before school opened in September.[284] Terrel H. Bell, a former Commissioner of Education, maintains that redistricting is necessary if desegregation is to be realized; he asserts that it is state legislatures which must face up to this responsibility. Sidney P. Marland, also a federal ex-commissioner, feels the federal government should offer incentives in the form of more technical and financial assistance to states or districts wanting to desegregate, so that desegregation could be implemented on a broad basis, not in the

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[282] *See* Hooker note 165 *supra* at . Hoots v. Commonwealth of Penn., 359 F. Supp. 821 (1973); U.S. v. Bd. of School Commissioners, Indianapolis, 503 F.2d 86 (7th Cir., 1974).

[283] Statement made by Robert J. Weinkoop, Staff Advisor for Desegregation Activities, Jefferson County Schools, Louisville, Kentucky at a meeting entitled "Implementing Successful School Desegregation Plans" at the 110th Annual Convention of the A.A.S.A. (American Association of School Administrators), Atlanta, Georgia, Convention Center, February 18, 1978. Tape on file at: Eastern Audio Associates, Inc. 9505 Berger Road, Columbia, Md. 21045.

[284] *Id.*

one-by-one court case tradition.[285] Wilmington, Delaware was not protected under *Milliken*, and thus is involved in a New Castle County metropolitan remedy. State level housing and redistricting action had left the city all Black. Ironically, New Castle County plaintiffs were among those in the original *Brown* case.[286]

Besides the constitutionality of a metropolitan remedy, the *Milliken* court expressed concern about the technical and logistic problems of administering a giant conglomeration of over fifty sub-units,[287] enrolling 503,000 students from the suburbs and 276,000 from Detroit itself.[288] In addition to limiting the equitable power of a district court, *Milliken* actually appeared to limit the actual physical scope of relief to practical size. Some courts, even though they have found interdistrict violation, have distinguished *Milliken* on the ground, rather, that because their order:

> involved a narrower geographical scope, it would not create the administrative problems, the extensive disruption of education, and the infringement on parental control that the Supreme Court feared would result from a metropolitan remedy in Detroit. . . . Thus, it appears that the lower courts are, in effect,

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[285] A.A.S.A. Convention, *supra*; meeting entitled "Future of Education in America," February 17, 1978.

[286] Meeting described in note 283 *supra*. Statement by Carroll W. Biggs, Superintendent, Alfred I. Du Pont School District, Wilmington, Delaware. *See* note 78 *supra* for list of *Brown* plaintiffs; Evans v. Buchanan, 393 F. Supp. 428, 438 (D. Del. 1975), *aff'd.*, 423 U.S. 963 (1975).

[287] *Milliken*, 418 U.S. at 743-4.

[288] Kluger, *supra* at 771.

> interpreting *Milliken* not as a constitutional ban on interdistrict remedies, but as a mandate to consider the pluralistic interests of home-school proximity and effective community participation in public education.[289]

Critics say desegregation courts in the past have had primarily a custodial interest in students--that is housing them specifically to meet desegregation guidelines. Courts did not want to get involved in educational programs[290] nor the big concern for safety of children--in school, on the way to school, or at extracurricular activities.[291]

Dworkin made the interesting observation that *Milliken* proved that guilt had to be established before punishment would be imposed by the Burger majority. Here, in pondering the nature of that guilt, he perhaps reveals underlying reasons for the recent trend in decisions to shy away from heavy-handed remedies; he lends support to the suburban position:

> Consider the position of some child (perhaps a white child) whose education will suffer if busing is ordered, *not* because an integrated education will in itself be any worse for him, but because of the dislocations and inefficiencies and antagonisms that busing will produce. The strong form of the consequence hypothesis, which we are supposing to be true, implies that if there had been no *de jure* segregation, he would have had an integrated education. But it does not follow that busing will restore him to the position he would have occupied had there been no prior injustice. In that event he would have attended

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[289] *Education and the Law* at 1418-19. Cases cited are: 418 U.S. at 744. *See* Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd* ., 423 U.S. 963 (1975); United States v. Missouri, 388 F. Supp. 1058 (E.D. Mo. 1975). This trend was noted in district cases in Chapter III *supra*.

[290] *See* note 283 *supra*; Dudley E. Flood, Assistant Superintendent of Public Instruction, Rawleigh, North Carolina.

[291] Biggs, *see* note 286 *supra*.

an integrated neighborhood school set in an integrated neighborhood, without social tensions. There is instead a new situation which is, by hypothesis, much worse, and where his educational opportunities will be more limited. It cannot be said, in rebuttal, that he has in some way benefitted by the past injustice and therefore it is fair that he should now suffer. He is not guilty of any wrong. Nor (again by hypothesis) has he gained through the wrong of another. There is no unjust enrichment at all.[292]

The Triumph of Political Pluralism

The struggles in the interdistrict desegregation cases place the countervailing interests of pluralism and collectivism in sharp focus. The interest of a pluralistic racial group (Blacks primarily) to gain a collectivistic goal of education--socialization in White middle class values--was thwarted by the lack of a majority with whom to socialize. The *Michigan Law Review* observes that in a contest between desegregation and political pluralism, the latter will overcome. "The Court apparently concluded that the core collectivist interest in education is limited to providing all children with a nonstigmatizing educational experience that prepares them for participation in *their* community."[293] This article maintains:

> This result is analogous to that reached in *Yoder*, in which the Court recognized a core collectivist interest in educating individuals to the point at which they no longer threaten to be a liability to society. The *Yoder* Court recognized that there is a further interest in preparing individuals to be assets to society, but it concluded that the autonomy of the Amish had greater weight. Similarly, the *Milliken* Court recognized the importance of a limited amount

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[292] See Dworkin note 275 *supra* at 9.

[293] *Education and the Law* at 1417.

> of socialization that could arguably prevent individuals from becoming community liabilities, but it held that socialization with a broader geographic referent could outweigh the benefits of local control.[294]

In *Yoder*, however, the limited socialization for the pluralistic group was desired by, rather than forced upon, that group. There may be a similar desire among many Blacks to come to an accommodation between a mature pluralism and integration. And their ultimate political power, given their heavy concentration in key areas, may eventually give them the reins of the precious local control the Constitution has so long sheltered and used against them.

Equality of educational opportunity in racial terms has been defined primarily by the courts. As a result, courts have become increasingly cautious in prescribing beyond *minima* in other equal protection requests because of the impossibility of assessing the implications of even narrow prescriptions and also because of the mixed results of the "kill or cure" desegregation remedies. Further, a growing need is perceived by the courts in accommodating cultural, community, and political pluralism.[295] And although district courts meet the constitutional bar in crossing district lines, state legislatures do not meet the same obstacle. Legislatures can perhaps follow the most politically expedient route after weighing the pressure for collectivism, uniformity, and paternalism against the rising expressions

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[294] *Id.* at 1417-18.

[295] *Id.* Also *see generally* Lundquist and Wise, *Developments in Education Litigation: Equal Protection*, 5 J.L. Educ 1, (1976) 1, and Kirp, *Law, Politics and Equal Educational Opportunity*, *supra*.

of cultural diversity and a new political pluralism levened by minority power but soured by a sprawling state and federal level bureaucracy.

Dividing the District: Community Control

To contrast with the aims of the plaintiffs in *Milliken*, who advanced the creation of a superdistrict to make desegregation viable, are the aims of advocates of community control who advance the carving up of existing districts into pluralistic enclaves. Nor did this phenomenon have much in common with the splinter district cases, where White political power was mobilized to attempt to preserve a higher percentage of Whites in the smaller area. Community control demands reflect a desire for minority groups to have a more direct voice in the running of the schools and thus reduce the chance of bureaucratic unresponsiveness.[296] "In particular, those parents who support decentralization desire greater control of the socialization of their children."[297] Community control advocates resent the middle-class orientation of the socialization process in American public schools, and to some extent the value-based selection of the curriculum itself; they would instead see the school's purpose as encouraging ethnic solidarity and as debunking majoritarian American myths.[298] The push for decentralization represents an attempt to

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[296] Marilyn Gittell, *The Participants* in Governing Education, ed. Alan Rosenthal (New York: Anchor Books, 1969) 455 at 479.

[297] *Education and the Law* at 1488.

[298] *Id.*

reject the importance of socialization which majority groups fought for so hard in *Brown*, while asserting the traditional majoritarian right to seize the political and financial power to control one's own destiny. This push was characterized by a larger proportion of citizen input in formulating policy than that which existed in typical majoritarian operated schools where laymen often traditionally deferred to professional expertise.

Decentralization, as practiced in New York at least, definitely did show that parents were not apathetic when they knew their voices would be heard.[299] However, this appeared to be the only completely positive result of the community control idea which experienced only a short period of intense advocacy.

Among the obstacles community control advocates face are: 1) Teachers, school officials, and many citizens preferred the advantages in influence that the status quo provided.[300] 2) The community is hard to define; the community may itself contain pluralistic enclaves with competing demands.[301] 3) It does not have the complete support of minority groups, but mainly lower class, transient ghetto groups.[302] 4) There is a question as to the functions to be controlled--"selection of the principal, evaluation of teachers, selection of textbooks, and/or allocation of funds."[303] 5) It could

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[299] *Id.* at 1491 n. 687. Also see Gittell, note 296 *supra*, for a description of the decentralization example in New York City.

[300] *Id.* at 1490-93.

[301] Campbell note 120 *supra* at 386.

[302] *Id.* at 385.

[303] *Id.* at 386.

increase funding disparities and equalization problems for states.[304] 6) It meets the opposition of integrationists and may be unconstitutional.[305]

Brown ruled that minority students who were officially restricted from attendance at majority schools were being denied equality of educational opportunity. Although a suit involving community control has not been litigated, its constitutionality would appear to be dubious. *Deal v. Cincinnati Board of Education* ruled that "When no discrimination is shown, racial imbalance alone is no warrant for relief,"[306] but the rulings of two other courts suggest a serious obstacle. Rulings in the Second and Eighth Circuits "held that segregative intent, and therefore *de jure* segregation, exist when school authorities engage in acts or omissions, the natural, probable and foreseeable consequence of which is to cause or to maintain segregation."[307] It would thus appear that minority students who attend *de facto* segregated inner city schools where there are no

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[304] Stephen D. Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity* in Future Directions for School Finance Reform, ed. Betsy Levin, note 8 *supra* at 255.

[305] *See generally* Kirp, *Community Control, Public Policy and the Limits of the Law*, *supra* note 125 and *Education and the Law* at 1495-97.

[306] 369 F.2d 55 (6th Cir. 1966) at 63. Such a view has recently been reaffirmed in Higgins v. Board of Educ., 508 F.2d 779, 792-93 (6th Cir. 1974); Bronson v. Board of Educ., 525 F.2d 344, 345-47 (6th Cir. 1975).

[307] *Education and the Law* at 1495. United States v. School District of Omaha, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Hart v. Community School Board of Education, 512 F.2d 37 (2d Cir. 1975).

Whites with whom to desegregate are the beneficiaries of legal equality of educational opportunity; however, those same students, if their community is awarded control of the school by statute or school district relinquishment of power, become the victims of unconstitutional statutory *de jure* segregation. In stark contrast, another type of decentralization, suburbanization, secures a level of constitutional approval taking precedent over the constitutional obligation to desegregate.

The phenomenon of suburbanization has political meaning. It can be viewed as another example of individuals attempting to exert greater influence over their government by moving out of the city and forming smaller communities. This enables them to make choices on such subjects as tax rates, types of city services, and, of course, educational policy, that would not be possible in the larger city. In part, this ability to make one's government more accountable is a result of the relative homogeneity typical of suburban groups.[308]

There has not been much pressure for decentralization since 1970; whether it constituted a threat toward local control, or could be classified as a more sophisticated form of local control is difficult to say. It had the effect of diluting the minority clout of larger pressure groups, and in New York, it offered minorities "communities" enrolling over twenty thousand students.[309] But the proportion of students who are treated to city-style desegregation make up a remarkable portion of the nation's students; Detroit enrolls

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[308] *Id.* at 1488.

[309] *Id.* at 1490.

more students than the whole state of Mississippi.[310] Furthermore,

> [H]alf of the nation's local school boards have fewer than three hundred students, but nearly two hundred boards have over twenty-five thousand students apiece. New York City's board alone has over one million students, which is a greater student population than is found in a majority of the states. Nearly half of all U.S. students are under the control of less than three per cent of the nation's school boards.

But perhaps community control is not worth the effort; it obviously obstructs progress toward the collectivist goal of socialization and there is no evidence showing either that increased parental participation or smaller, less bureaucratic districts can produce greater student achievement.[311]

Even though decentralization amounted to little more than a fleeting sequel to the urban desegregation saga, its presence provides some valuable insights into the tensions existing between collectivism and pluralism. Commenting on the phenomenon of community control Fein observes:

> [D]espite the prevailing myth that education is a secular institution, the history of the schools can, and should, be read as an example of creative tension between the particular and the universal. The standard compromise has been to create largely parochial structures while emphasizing fundamentally universal content. The operational implication of this failure to choose, if it is to be continued, is, first, that the best of two worlds may be available, or, at least, the worst of both may be avoided. There is, after all, a cyclicality to these affairs, and the balance, most recently heavily weighted toward the universalist norm, now needs to be adjusted to favor the particularistic.[312]

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[310] *Id.* at 1487.

[311] *Id.* at 1491. These figures have undoubtedly been altered somewhat owing to continued flight from urban centers.

[312] See Fein note 123 *supra*, *Community Schools and Social Theory: The Limits of Universalism* at 422.

The definition of equality of educational opportunity does not presently include community control. The definition has nonetheless exhibited a related adjustment however, through the courts' recent tendency to honor the pluralistic interests of parents in assigning desegregation remedies and in recognizing the interests of competing cultures in the *Lau* decision.[313]

Interdistrict Financial Inequality

The definition of equality of educational opportunity is embroiled in great conflict in the arena of interdistrict or intrastate financing of public schools. This conflict is focused on the inequities resulting when educational expenditures are dependent on the tax wealth of the school district in which students happen to reside. Both courts and legislatures have been asked to end wealth discrimination in education funding schemes on the grounds that such a practice, like racial discrimination, violates the equal protection clause. Ironically this genre represents a complete turnabout from the finance cases fifty or sixty years ago which:

> . . . initiated in state courts by taxpayers who contested the state's method of redistributing tax revenues to school districts. Most of the early litigation actually challenged the state's efforts to equalize educational expenditures among districts through its method of allocating public funds. The courts generally held that matters of taxation were within the powers of the state legislature and that the state only had to demonstrate a rational relationship between the classifications

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[313] This conclusion has been elaborated upon *supra* in text accompanying notes 71, 165, and 238.

employed and the governmental purposes. *See* Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912); Miller v. Korns, 107 Ohio St. 287, 240 N.E. 773 (1923); Miller v. Childers, 107 Okla. 57, 238 P. 204 (1924).[314]

In contrast, the states in court cases recently, have asserted that allowing local districts great leeway in setting the level of educational quality bears a rational relation to the way they have chosen to provide for a statewide educational program. In the early cases the states claimed equalizing educational expenditures accomplished the positive purpose of redistribution of tax revenues, while recently the defendant states have claimed unequal expenditures from district to district are a fortuitous consequence of an otherwise desirable system of creative, fiscal, and political federalism.

Many roadblocks prevent the judicial resolution of this issue as a legitimate equal protection claim. Certainly pluralistic funding schemes qualify as state action, but there is disagreement as to whether such action in school finance cases is to be condemned or commended. Locating a discrete and insular suspect class has had mixed results. But attempts to establish criteria for measuring equality in expenditures per student have created the worst obstacle--whether an input or output measure should be applied cannot be scientifically proved, but rather is a value judgment. In addition, establishing harm for the amorphous suspect group by crude attempts to measure the effects of either inputs or outputs have been largely

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[314] *See* McCarthy note 10 *supra* who made this interesting observation in n. 25 at 164.

abortive.[315] And although legislatures, unlike courts, don't necessarily require principles or evidence on which to act--high equalization costs, attempts to maintain the support of well-off districts, and unclear judicial directives often impede effective legislation.[316]

A brief review of the desegregation relief prompted by *Brown* and the requests for equality of educational opportunity that followed the *Brown* example is useful before a discussion of the complex issue of interstate financial equity begins. The Supreme Court ruled that state action which segregated a suspect class (race) in public schools was a denial of equality of opportunity--an officially established separate education could never be equal from the standpoint of socialization and in practice probably never was from the standpoint of academic achievement, both collectivistic goals. A clear denial of equality--a principle on which there was a general moral consensus--was not open to question so long as state action could be proved; subsequently "appropriate" relief could be assigned.[317] In cases involving remedies crossing autonomous district boundaries, however, state action had to be found in every district affected by the relief, since local control guaranteed by the Tenth Amendment took precedence

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[315] Support for these statements will be detailed in the remainder of this chapter *infra*.

[316] These reasons are detailed in Reischeuer and Hartman, Reforming School Finance, *supra* note 21 at 72-94.

[317] *See* Chapter III *supra*: "Brown and the South" at 34-49 and "Brown and the North" at 49-68.

to legal segregation not caused by state action.[318]

Of the groups claiming discriminatory treatment in education based on invidious classifications *supra*--sex, tracked students, mentally and physically handicapped and non-English speaking--none was officially awarded constitutional equal protection of the laws by the Supreme Court through strict scrutiny analysis. The only request even heard by the High Court was that of the non-English speaking in *Lau*,[319] and the court skirted the constitutional suspect-equal protection issue by finding a violation under Civil Rights legislation. Remedies for inequalities suffered by the tracked and handicapped students, as well as the non-English speaking, were easily assigned by lower courts since federal and state governments stepped in with generous funds, technical assistance, and protective laws. Sex discrimination in public education was relieved largely by federal legislation and increased public awareness.[320]

What the state residents are asking for then in interdistrict funding inequity suits is for relief under a violation of the equal protection clause of the United States Constitution. To do this plaintiffs claim they constitute a suspect classification receiving injury in the form of inferior treatment caused by state action with respect to a fundamental right--education. Such relief on such grounds had not been granted by the Supreme Court in a non-racial

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[318] *See* "Interdistrict Desegregation" text *supra* at note 260.

[319] 412 U.S. 938 (1973).

[320] *See* Chapter III *supra*: "Brown Opens the Equality Door" at 68-100.

education inequality dispute since 1954 in *Brown*; and, in fact, such relief had been denied whenever the countervailing interests of local control were present--even in the well-established equal protection preserve of racial discrimination.

Early Questions in Interdistrict Equity

But *Brown* is a hard act to follow. An early interdistrict inequality suit was pressed in *McInnis v. Shapiro* using the notorious "needs" argument. The plaintiffs contended statutes permitting wide variations in the expenditures per student from one district to another deprived some students with "equal or even greater need" and that these statutes thus violated constitutional rights to equal protection.[321] The *McInnis* needs argument was rejected because no suspect class was established, the Illinois scheme for financing schools was deemed rational, equal expenditures per student had never been established as a constitutional requirement, and the needs standard was eminently nonjusticiable.[322] Indeed, Coons asserts that:

> Had the federal courts entertained this view, a fair portion of the social science professions could have become engaged in litigation on a full time basis advising courts how to define need and declaring what each child needed and how much of this he was not getting. Fortunately the proposal received short judicial shrift.[323]

Notwithstanding this derision, the real reason for the failure of the Illinois suit comes into sharper focus when the needs argument is

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[321] McInnis v. Shapiro, 293 F. Supp. 327 (ND Ill. 1968), *aff'd sub nom*, McInnis v. Ogilvie, 394 U.S. 322 1969 at 327-38.

[322] *Id.*

[323] Coons *supra*, *Recent Trends in Science Fiction* at 36.

honored three years later by a lower court in *Serna v. Portales*[324] although no intervening decisions had reversed the High Court's needs ruling.[325] The needs in *Serna*, admittedly, were more manageable--plaintiffs claimed they were getting an education appropriate for a middle-class English speaking child instead of one tailored to the needs of the Spanish surnamed children. Importantly, the court noted:

> [I]t would be a deprivation of equal protection for a school district to effectuate a curriculum which is not tailored to the educational needs of *minority students*. . . . The promulgation and institution of a program by the Portales school district which ignores the *needs of such students* does *constitute state action*.[326]

This statement tends to emphasize the *bona fide* suspect classification of the plaintiffs to undermine the reasonableness of the "state action." But the tell-tale element that makes it possible for the court to so casually assess needs and order a remedy are rendered in the words "a school district." Local control is not at stake so the court can accuse "the Portales school district" of state action when it omits a "needed" program. But it is easier anyway, it appears, for lower courts to locate constitutional violations under the equal protection clause. When the Supreme Court recognized the "functional exclusion" of non-English speaking children, it did not find a violation of the Constitution, but rather of the less awesome Civil Rights

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[324] Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (DMN 1972).

[325] Yudof note 22 *supra* at 551.

[326] 449 F.2d 1147 (10 Cir. 1974) at

statutes.[327] Similarly, a California court found it easy to identify the requisite injury caused by resource inequities, the suspect class, the fundamental right, and the absence of any compelling interest in the way in which the state had chosen to finance the public schools.[328] Understanding the pitfalls of the "needs" argument and the threat to local control advanced in *McInnis*, tacticians for the *Serrano* assault "did not speak to the particulars of resource distribution . . . but only declared impermissible one among many modes of financing schooling" according to Kirp. "The genius of the *Serrano* approach . . . was that it conceded that school-finance questions are generally political, while carving out a limited and comprehensible role for the courts," he said.[329] The fiscal neutrality standard required only that the connection between local wealth and educational expenditure be severed. Any other revenue raising scheme would pass muster; legislators would be free to decide on the just or expedient ways to distribute the revenues. If school districts had equal or constructively equal tax bases, spending variations deriving from other causes such as effort would be permissible under the new fiscal neutrality standard. Attesting to the success of the strategy Justice Sullivan ruled:

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[327] Lau v. Nichols, 412 U.S. 938 (1973).

[328] Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

[329] *See* Kirp, *Law, Politics and Equal Opportunity*, *supra* at 123. He attributes the genius to John E. Coons, William H. Clune, and Stephen D. Sugarman n. 32.

> We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing.[330]

Despite this strong judicial statement, the California Supreme Court had ruled only on the plaintiffs allegations; the court held that the complaint stated a claim that still had to be proved and remanded it to the superior court for trial.[331] It thus appeared that an interdistrict remedy could be implemented that did not have to destroy local control. The court probably would not have received the plaintiffs proposal so amiably, had it made necessary the choice between the two. The court pointed out that the existing system was not necessary to promote local control, and furthermore that such control was a perogative of only the wealthy districts, saying local control was a "cruel illusion" for poor districts providing a minimum program with a maximum tax rate.[332]

Serrano caught on like wildfire. Federal and state courts in thirty-one states borrowed both its legal analysis and its conclusions.[333] Rulings followed in federal district courts in Minnesota and Texas. "In Michigan, the state supreme court took original jurisdiction and in an action filed by the governor, ruled the

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[330] 96 Cal. Rptr. at 604.

[331] David C. Long, *Educational Finance Litigation*

[332] 487 P.2d at 1260.

[333] *See* Kirp *supra* at 122.

Michigan system unconstitutional. Many state trial courts followed suit."[334] Betsy Levin maintains that "[T]he fiscal neutrality principle articulated by Coons, Clune, and Sugerman" in "less than three years since its birth had received considerably more attention and notoriety than doctrines of much older vintage."[335] Coons, interestingly, attributes as much success to another tactic, that of choosing a viable clientele for the injured class; *Serrano* purists fought for "pupils resident in relatively poor districts." This was remarkable foresight; Coons claims that the *Rodriguez* plaintiffs erred in trying to show a correlation between district and personal poverty, "thereby inviting opponents" to enter a "poor spotting contest" in rich districts around the country--an invitation they gladly accepted.[336]

The *Rodriguez* Barrier

Six years before *Rodriguez* Arthur Wise compared school desegregation cases in order to establish a precedent to solve the problem of interdistrict inequalities in education. He claimed the curtailed educational opportunities were in clear violation of Fourteenth Amendment decisions made by the Supreme Court. If the Supreme Court were to decide against "permitting the circumstances of parental wealth and geography" to determine educational equality "we

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[334] See Long *supra* at 323 citing A Summary of State Wide School Finance Cases (Washington, D.C.: Lawyers Committee for Civil Rights Under the Law, May 1974).

[335] Betsy Levin note 8 *supra* at X.

[336] See Coons, in his introduction to the Levin volume, *Fiscal Neutrality After Rodriguez*, notes 6 and 55 at 4.

would be heeding" the equal protection clause of the Constitution which guarantees "that the state cannot deny to some what it grants to others."[337] Wise's is a conceptual stance reflecting a dependence on a self-evident moral right of children to an all inclusive definition of equality of educational opportunity. This contrasts sharply to the shrewd practical strategies employed by Coons, Clune, and Sugarman to deal with immediate legal realities in a state court case.[338]

Eight years after the formulation of his thesis, and two years after *Rodriguez*, Wise exhibits a more skeptical outlook that takes into account the interminable pull between collectivistic and pluralistic interests that frustrates resolution of equality contests involving political pluralism.

> The attempt to formulate a cognizable legal theory or standard for equality of educational opportunity faces a myriad of difficulties. No social concensus exists as to the proper function of education. Societal goals for education are ill-defined and often conflicting. Local control over schooling is believed to be an operational reality, indeed, a desirable feature of American education. Social science research often confounds delineation of the effects of the educational process rather than elucidating them. Valid measures of educational quality remain elusive. Traditional conceptions of the judicial role militate against involvement in education. Education disputes are viewed as essentially political questions, devoid of any judicially manageable standards. Even the number and precision of possible standards pose difficulties. Nonetheless,

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[337] *See* Wise, Rich Schools, Poor Schools note 8 *supra* at 214 and dustjacket. The thesis he presents was formulated three years before *Serrano* and six years before *Rodriguez*--hence the optimism.

[338] Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601.

much of recent education litigation is founded on the assumption that a justiciable definition of equal educational opportunity can be formulated.[339]

Whether one approves of the *Rodriguez* outcome or not, it is fruitful to compare both the legal arguments and judicial conclusions advanced in *Rodriguez* to *Brown* as two examples of equal protection claims. *Rodriguez v. San Antonio School District*, like *Serrano*, was tried and won by a lower court.[340] The State of Texas appealed, "placing the issue squarely before the United States Supreme Court before the seed of school finance reform had had an opportunity to germinate in the lower courts."[341] Reversing, Justice Powell maintained that district wealth and the "class of disadvantaged 'poor' cannot be identified in customary equal protection terms." Additionally, he recognized evidence that showed that the 'poor' do not necessarily live in poor school districts. Indeed, these three conditions would prevent such a group from passing the suspectness test that school reform advocate, Betsy Levin, has made famous.[342]

1. Does the class have an immutable characteristic?
2. Has there been a history of invidious discrimination against the class in question?
3. Is the class a discrete and insular minority?

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[339]Robert E. Lindquist and Arthur Wise, *Developments in Educational Litigation: Equal Protection*, 5 J.L. Educ. 1 (1976), at 1-2.

[340]Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280.

[341]*See* Long, *supra* at 10.

[342]San Antonio Independent School District v. Rodriguez, 411 U.S. 1 at 19 and 23.

4. Is the class politically powerless?
5. Does the classification stigmatize members of the class as inferior?[343]

Since the poor consists of a constantly shifting group, and can be described in both social or financial terms, the "poor" issue, like the needs issue defies identification--a problem not existing for the Black plaintiffs in *Brown*.

Justice Powell dealt with the contention that education is a fundamental interest in a similar fashion. On this issue Peter D. Roos aptly comments,

> Although the initial reaction of many educational reform attorneys to *Rodriguez* was despair, closer analysis and reflection should lead to a more sanguine attitude. While the holding that education is not a fundamental interest has dashed the hopes of many, it must be remembered that these were only inchoate hopes. Very few prior decisions were directly based on the fundamental nature of education.[344]

Brown, he points out, speaks only of the importance of education. Further, the justice maintained that the deprivation in *Rodriguez* was relative rather than absolute--all children in Texas were receiving a minimum prescribed education.[345] And here perhaps is the most subtle contrast to *Brown*. The deprivation in *Brown* was absolute in the sense that the state action prevented Black students to meet the goal of socialization in majoritarian values--one of the

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[343] See Betsy Levin note 49 *supra* at 34.

[344] Peter D. Roos, *The Potential Impact of Rodriguez on Other School Reform Legislation* in Levin note 8 *supra* at 279. But see Coons note 336 *supra* and Wise note 339 *supra* who contend that the courts' view is erroneous.

[345] 411 U.S. at 18-29. But see Coons and Wise, *id.* Finance reformists find the logic of Justice Powell's argument unsatisfactory, contending "adequacy" is not analogous to equality.

collectivist goals of education. The goal of academic instruction amounted to a relative deprivation under the old separate but equal standard. Although improvement in both goals was sought, the act of desegregation itself involved the socialization goal and so did the injury--the insult that statutory segregation implied. And the role of the school in the socialization process cannot be underestimated. The citations to *Sweatt v. Painter* and *McLaurin v. Oklahoma* were made in *Brown* precisely to show the impotency of an isolated academic education.[346] Coleman has since shown that curriculum and learning are secondary concerns in the teenage subculture operating in the American secondary school.[347] Parsons emphasizes the complementary roles academic learning and socialization play in the American classroom, while Dreeben maintains that the learning delivery system is significant as a socializing factor--independent of the nature of what is actually learned.[348] Yet, socialization is not an issue in *Rodriguez* or in any of the arguments for school finance reform. Reform advocates, although not too successful at identifying the exact harm that a paucity in expenditures induces, would by their omission of the socialization issue, imply that the inequality is in the quality of academic instruction.[349] In fact Coons states that having access to

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[346] Sweatt v. Painter, 339 U.S. 629 (1950). McLaurin v. Oklahoma, 339 U.S. 637 (1948); cited in Brown v. Board of Education; U.S. 483 (1954). *See* text at note 96 *supra*.

[347] James S. Coleman, The Adolescent Society (New York: Free Press, 1961).

[348] *See* Parsons notes 44, 131 and Dreeben notes 45, 132 *supra*.

[349] Sarane S. Boocock, An Introduction to the Sociology of Learning (Boston: Houghton, Mifflin Co., 1972).

a language lab, library, orchestra, or counseling service are significant improvements over the necessary minimum.[350]

But other ardent reformists looking back observe:

> To find a constitutional violation the majority needed direct and incontrovertible evidence that disparities in educational expenditures harmed poor children or harmed children living in property-poor school districts. They needed evidence that disparities in educational expenditures resulted in damage to the ". . . hearts and minds of children in a way unlikely ever to be undone."[351]

Notwithstanding, the plaintiffs in *Rodriguez* asserted that not only was the injured class poor, but the class tended to reside in poor school districts. If they really believed this and felt their unequal treatment was comparable to that in *Brown*, why didn't they ask to be bused into wealthy districts populated by affluent and cultured White students? If all the research can be trusted which spells out a correlation between socioeconomic status and school achievement, and the importance of placing low S.E.S. students in classrooms with a majority of high S.E.S. students, how can these deprived students hope to improve if they remain in segregated lower-class ghettos officially designated as school districts? Fiscal neutrality asserts that school district organization and control can remain intact so long as the expenditure per pupil is not based on the tax base per pupil. Money can't buy socialization. Money can buy Coon's language labs, libraries, and violins, but can it ever provide students to use these status symbols in a school entirely populated by deprived students?

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[350] Coons in Levin *supra* at 6.

[351] Lundquist and Wise *supra* at 13 quoting *Brown*.

The practical strategist of *Serrano* lapses into a romantic picture of America's deprived students; not even average middle class students utilize language labs, libraries, and orchestras to any great extent--only the most select of the college bound groups do.[352] The idea of handing a violin to a culturally disadvantaged student who can barely read words, much less notes, is ludicrous. Such ivory tower egalitarianism and ignorance of the realities of school life may be factors in the failure of school finance reformists to sell their ideas.

If the poor were always segregated in poor districts, reformists should be demanding more than "separate but equal" educations. However, according to Reischauer, this is not always true. Reischauer shows that:

> Although income per pupil is highest in the wealthy suburbs, income per pupil in central cities is on the whole higher than in the average suburb; this is not because income per capita is high but because the fraction of the cities' population that is enrolled in public schools is low. On a per-capita basis, most cities are poorer than their suburbs. By the income measure, rural districts generally have the least in the way of revenue raising ability.
>
> It is important to note that the criterion by which fiscal capacity is measured may alter the relative rankings of some districts. In many states the correlation between the property values of a district and the income of its residents is weak. Districts that seem wealthy by the property value measure often seem poor when ranked by income. One reason for this is that many communities with large concentrations of nonresidential property house predominantly low and lower middle income families.[353]

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[352] An observation made by the author after sixteen years of experience in urban high schools and study of research on adolescents. See text at note 375 *infra* for a scholarly treatment of idealism versus realism in school finance.

[353] Reischauer, *Reforming School Finance*, *supra* at 70. But see Alvin H. Townsel, *Adjustments for Urban Fiscal Problems in State School Finance Systems* 2 J. Educ. Finance (Summer 1977) 50 who shows that the urban tax base is decreasing owing to White flight, industrial flight, a high cost clientele and municipal overburden.

Since the *Rodriguez* court could identify no suspect class, no absolute deprivation caused by wealth discrimination and no fundamental interest at stake, the constitutionality of the Texas system of public school finance had only to bear a rational relation to some legitimate state purposes.

> The Court found that the Texas system was predicated on two goals: the state's first purpose is to assure ". . . a basic education for every child in the State, . . ." Its second purpose is to encourage ". . . a large measure of participation in and control of each district's schools at the local level."[354]

The court found the basic education to be an "adequate" level and cited statutory regulations regarding books, attendance, teacher qualifications, transportation and a minimum expenditure level.[355] The court then assessed the importance of the second purpose of the system of school finance:

> In part, local control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.[356]

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[354] *Rodriguez*, 411 U.S. at 49.

[355] *Rodriguez*, 411 U.S. at 45 & nn. 89-97, citing Tex. Educ. Code Ann. secs. 11, 26(5), 12.01-12.04, 16.13-19, 16.45, 16.51-16.63, 16.301 *et seq.* *But see* Lundquist and Wise who criticize:

> Justice Powell glossed over the relevance of substantial financial and educational inequalities inherent in the Texas system. While Justice Powell purports that the statutory provisions cited regulate the quality of education in Texas, he failed to delineate any standard by which the quality of education could actually be judged. Moreover, he failed to define the level of proof required to demonstrate inadequacy in the educational system.

[356] *Id.* at 49-50.

The court expressed fears that it was being "urged to direct the states either to alter drastically the present system or to throw out the property tax altogether. . . ."[357] Long criticizes this stance, saying,

> [U]nder state law, education is almost universally considered a constitutional function of state government and school districts are generally considered agents of the state, and not units of local government, for carrying out this constitutional duty. The court thus failed to make a distinction between popular perceptions of education serving local interests and the actual legal relationship between school districts and the state.[358]

And since the state is responsible for the instant inequality resulting from its action, the argument has been advanced that the inequities in expenditures constitute *de jure* discrimination.[359] This view ignores the particular circumstances; since the court has found no suspect class, no fundamental interest, or no absolute deprivation, it need not acknowledge the existence of discrimination. Thus the state need not show a compelling interest for its action, but only a rational relation to some government purpose.

In his dissent to the majority decision in *Rodriguez* Justice Thurgood Marshall charged that "[I]t is apparent that the State's purported concern with local control is offered primarily as an excuse rather than a justification for interdistrict inequality."[360]

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[357] *Id.* at 41.

[358] *See* Long, *supra* at 237 and n. 42. *See also* Lundquist and Wise, *supra*, who question the court's local control position.

[359] *See* McCarthy, *supra* at 10. She asserts this is inconsistent with the *Milliken* ruling on interdistrict violation.

[360] 411 U.S. at 132.

However, an argument could be made that it is the other way around. Local and unfettered state control of education is the controlling issue and the Court was pleased that the plaintiffs case was so poorly organized that the justices could not be expected to find a suspect class, a fundamental interest, or a *bona fide* injury resulting from a correlation between cost and quality. The Court is understandably gun-shy after observing the violence, resistance, and upheavals still present in the society resulting from a racial educational equality decision that was morally inescapable made in 1954. Even when the principle of racial equality met head-on with the principle of political pluralism, there was a public outcry from suburban people affected claiming the right to control their own destiny; many others, not affected, would defend this right. The Fourteenth Amendment gave way to the Tenth.[361] Criticism of the Court's naiveté in local and state control misses the point.[362] The Court showed its recognition of what many Americans *perceive* to be a cherished operative reality that sets their freedom apart from other more paternalistic societies:[363] "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state."[364] Local control has

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[361] Milliken v. Bradley, 418 U.S. 717 (1974).

[362] *See* Long statement in text at note 358 *supra*.

[363] *See* Lundquist and Wise statement in text at note 339 *supra*.

[364] *Rodriguez*, 411 U.S. at 132.

significantly been called a "cruel illusion" for property poor districts by local control opponents.[365] The "cruel" part is important, but the fact that the "illusion" persists is of far greater significance. But is it entirely an illusion? Citizens in poor districts may lack the power to adopt a more expensive program, but the most limited districts can, and often do, exert pressures that determine how evolution is to be taught, which books are to be censored, and whether theirs will be a basketball, football, or hockey school. These things are often perceived by parents as more important than sophisticated learning innovations educators favor.[366] The stubborn little communities in rural America who would choose to pay more to remain both small and poor in the face of impending consolidation have become legend. Indeed, if anything, there is a resurgence of public involvement in the schools.[367] "Voice" and

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[365] *Serrano*, 487 P.2d at 1260.

[366] *See generally* for community voicing of interest: Gregg W. Downey, *How Too Much "Local Control" Nearly Destroyed a School System*, American School Board Journal 164, No. 4:31 and related articles, April 1977; *Genesis Begets Biology Flop in Indiana and Texas*, Report on Education Research, April 6, 1977, p. 6; Kenneth D. Jenkins, *Community Participation and the Principal*, NASSP Bulletin 60, No. 403, November 1976, pp. 70-72; B. M. Morris, *The Religion of Humanism in Public Schools*, paper presented at the meeting of the National Convention of the National Congress for Educational Excellence, Tulsa, February 1976; C. M. Nolte, *Citizen Power Over Schools: How Much is Too Much?*, American School Board Journal, 163, 1976, pp. 34-36; and E. M. Powell and R. Byrne, *A Case Study: Battling Censorship*, NASSP Bulletin, 60, 1976, pp. 101-105. *See also* Coleman, The Adolescent Society, *supra* for significance of athletics in teenage sub-culture and school community.

[367] *See* sources listed *id.* and "Dividing the District: Community Control," *supra*.

"choice" have become catchwords ever in the lexicon of school governance reformists.[368]

But not all parents are thus involved. Sugarman contends that public schools are "professionally dominated" and that,

> [M]any policy-makers and educators argue that we must intensify professional efforts to deliver education to disadvantaged children in order to free them from the limits of family lethargy and background; some have argued that this response must come, if necessary, at the expense of children from more fortunate families.[369]

The cost may be higher than these professionals think. Reischauer argues that:

> Full state assumption would undoubtedly mean an increase in the total amount of resources devoted to education. Political pressures at the state level are such that the average expenditure per pupil in a state-financed school system would probably have to be close to the amount now spent in the state's high expenditure districts. The alternative of choosing a lower level of expenditure, or one closer to the existing state average, would involve cutting back the quality of schooling enjoyed by a substantial fraction of students, most of whom are the children of the more powerful and influential citizens of any state. If the level were too low, many families would quit the public school system, and the traditional support education has had in state legislatures might begin to decline.[370]

Removing high quality students could thwart the success of other litigated and legislated equality policies currently advocated. Speaking of the rights of the gifted, philosopher Michael Scriven concedes that "there is a pretty strong case for separation there, and if that case was conceded it would convert regular classrooms into

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[368] *See* Sugarman note 304 *supra* in an appraisal of voucher systems.

[369] *Id.* at 215. *But see* Gittell note 299 *supra* who found that decentralization reduced apathy dramatically.

[370] Reischauer, *supra* at 81.

mediocre classrooms by removing the best students and mainstreaming would lose much of its hoped-for advantages in terms of reducing discrimination."[371] In addition to correctly assessing the strong American sentiment for local control, the *Rodriguez* majority undoubtedly assessed a fear which invariably complements this sentiment. Reischauer, in reflecting on the fiscal dilemma facing education concludes that "Many Americans fear that a unitary state school system would necessarily be insensitive to local needs and problems, overbureaucratized, and of mediocre quality; the fear may well preclude complete state governance of schools even if states assume the full fiscal responsibility."[372] Philip Kurland maintains that an overriding judicial concern of any argument which limits local authority in choosing ways to assess, collect and expend tax funds, is that, if the argument is valid for education, it is equally applicable to other local governmental units. This prospect "calls for a more fundamental change in *our notions* of local governmental authority than any that the Supreme Court has yet compelled." (emphasis added)[373] Similarly, Lundquist and Wise affirm that a New Jersey justice "refused to extend equal protection to the field of school finance

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[371] Michael Scriven, *Some Issues in the Logic and Ethics of Mainstreaming*, 2 Minn. Educ. 2 (1976) at 63. Hard-won socialization of minorities and handicapped would be adversely affected.

[372] Reischauer, *supra* at 77.

[373] Kurland P, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583 at 589 (1968) commenting on McInnis v. Shapiro.

because he believed all local governmental services would soon be affected."[374]

Local educational control, itself, has perhaps been unfairly maligned because of the practice of legal and educational scholars to compare "imperfect existing systems of local control in education with ideal state control systems."[375] Thomas Jones shows that "local control has considerable merit" when he used a technique "to elevate local control to its ideal form and then compare the ideals."[376] He cautions, however, that "no comparison based on ideals can fully settle this matter" and that "only if full state funding and voucher systems were implemented in several states could their affects be assessed empirically rather than conceptually." Jones concludes:

> State control is likely to be very slow in coming. The purpose here has been to suggest that this may, in fact, be beneficial. With adequate state aid, fuller knowledge of the determinants of pupil achievement, better local financial management, and more integrated schools and classrooms, decentralization may work well. In states where the desire for local control is strong, attention should be focused on achieving the goals above rather than on achieving major shifts in financial and administrative responsibility.[377]

Post *Rodriguez* Strategies

The *Rodriguez* request did fail to meet constitutional equal protection requirements; however, this failure did not in any way

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[374] Lundquist and Wise, *supra* at 24-25; Robinson v. Cahill, 303 A 2d 273 (1973) at 285-87.

[375] Thomas H. Jones, *The Case for Local Control*, 2 J. Educ. Finance 1 (Summer 1977) 110 at 122.

[376] *Id.*

[377] *Id.*

end the pressure for interdistrict funding inequity in education. Relief has been both sought and gained through many other avenues. Betsy Levin avers that:

> Perhaps the most important contribution of that litigation was to make citizens and legislators more aware of the deficiencies and irrationalities of the current system for financing schools. An understanding of the system and the resulting inequalities in the raising and distributing of educational funds is no longer limited to a few school finance "experts."[378]

While the progress has been incremental, rather than dramatic, four general types of relief for the problems of inequitable funding have been manifested: 1) Litigation aimed at state constitutions. 2) Political resolution at the state level. 3) Spinoffs from litigation and legislation aimed at granting relief to other groups. 4) Spinoffs from enforcement of existing federal regulations.

Equal protection suits aimed at state constitutions which have clauses that elevate education to the status of a fundamental interest emerged early in California and New Jersey; similar activity was stimulated by the Lawyers' Committee for Civil Rights Under Law which explored education language in the fifty state constitutions and disseminated information to attorneys with pending school finance suits.[379] Since *Serrano* was not tried until after *Rodriguez*, the plaintiffs advanced their case against the California constitution's equal protection clause, one argument they had used in the original

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[378] Levin, *Future Direction in School Finance Reform*, *supra* at XII.

[379] *Id.*

litigation.[380] In *Robinson v. Cahill* the New Jersey Supreme Court upheld a challenge to the state's finance system finding it failed to satisfy the state constitutional requirement of a "thorough and efficient system" of public education.[381] However, "[V]ictory, in that case should give advocates of court-based educational reform more cause for concern than the *Rodriguez* defeat," according to Kirp.[382] The meaning of "thorough and efficient" is still a mystery after seven decisions and many concurrences and dissents. Politicians and experts alike have been unable to define "that educational opportunity which is needed in the contemporary setting in order to equip a child for his role as a citizen, and as a competitor i the labor markets."[383] In July 1976 the court ordered the schools closed until the legislature funded an equalization act it had passed previously. After the high hopes prompted by the original court action, urban plaintiffs were disappointed to learn that they were worse off after the reform was enacted.[384] State Supreme Courts in Idaho, Washington,

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[380] *Serrano*, Memorandum Opinion, at 30, citing Cal. Const. art. 9, secs. 1. "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people. The Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvements."

[381] Robinson v. Cahill, 303 A.2d 273 (1973).

[382] Kirp, *Law, Politics and Equal Educational Opportunity*, *supra* at 125.

[383] Robinson v. Cahill, 303 A.2d 273 (1973) at 295. A detailed treatment of judicial resolution of disparities will appear in "Intradistrict Remedy: A Simple Contrast."

[384] Kirp, *supra* at 125.

Montana, and Oregon have dismissed arguments that their systems of finance violate constitutional phrases such as "uniform system of free public schools" or "common schools where all the children of a state may be educated."[385]

Most relief for interdistrict disparities in expenditures per student has come through the rough and tumble of political bargaining in state capitals.[386] W. Norton Grubb reports dramatic increases in state contributions in financing education and those using variable matching grant formulas.[387] The state help has meshed well with citizen pressure for local property tax relief.[388] Promises not to reduce high spending levels have engaged the support of wealthy districts in raising expenditures in poorer districts.[389] Traditional trade-offs have been made; in Wisconsin the equalization act proposed was passed because the governor exerted significant leadership, focused attention on priority issues, and secured support of opponents in industry by including an item they wanted in the executive budget.[390]

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[385] *Id.* State ex re Woodahl v. Straub, 520 P.2d 776 (Mont. Sup. Ct. 1974); Northshore School Dist. v. Kinnear, 530 P.2d 178 (Wash. Sup. Ct. 1974); Thomas v. Engelking, 537 P.2d 635 (Idaho Sup. Ct. 1975); Olsen v. State, 554 P.2d 139 (Ore. Sup. Ct. 1976).

[386] See W. Norton Grubb, *The First Round of Legislative Reforms in the Post-Serrano World* in Levin volume note 8 *supra* at Appendix, 174 for a listing.

[387] *Id.* at 173.

[388] Levin, *supra* at X.

[389] Kirp, *supra* at 127.

[390] Terry G. Geske and Richard A. Rossmiller, *The Politics of School Fiscal Reform in Wisconsin*, 2 J. Educ. Finance 4 (Spring 1977), 513 at 531.

Other substantial relief has been forthcoming to students with special needs in both high and low tax base districts, although because of the very nature of the relief, it undoubtedly helps economically and racially disadvantaged students more. State and federal laws and funds assist mentally and physically handicapped and non-English speaking. In addition, E.S.E.A. categorical programs designed to help the disadvantaged give help to the poor in both poor and rich districts--but often in disproportionately large amounts to the poor or urban district. Such windfalls for special needs could never have survived courtroom definition.

Indirect federal assistance for eradicating disparities affecting the high cost/low tax base student has come by offering school districts planning money for equalization efforts and enforcing regulations such as the comparability requirement.[391] This requirement mandates that state and local expenditures in Title I schools be comparable to those in non Title I schools to insure that federal monies are additive rather than equalizing.

The precise limits that *Rodriguez* applied to the definition of equality of educational opportunity through the equal protection clause--that equal protection does not apply to education because it is not a fundamental interest, nor to a non-suspect class, nor to a claim threatening state and local rights to autonomy--serve as a contrast to the imprecise meaning non-constitutional pursuits present. The ascendancy of political pluralism specified by the Supreme Court

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[391] Kirp, *supra* at 121, 134.

has generally been maintained while the exact definition of equality as measured by the amount of equalization of expenditures per student varies from state to state. Clauses elevating education to a fundamental right have been invoked in state constitutions to stimulate legislative action toward equalizing interdistrict disparities, or legislative action alone has provided relief. Equalization through state collection and redistribution of revenues has lessened the effect of variations in local district wealth, but has generally not come at the expense of local autonomy. Variations still exist from district to district because of wealth or effort, but equalization acts have attempted to narrow the gaps.[392] The poor students championed in *Serrano* and *Rodriguez* have additionally benefited from resources aimed at the very needs courts find nonjusticiable by virtue of an array of federal and state programs helping disadvantaged or pluralistic groups with special individual needs within their ranks.

Intradistrict Remedy: A *Simple* Contrast

Although *Hobson v. Hanson* involves race, segregation, and the need for an interdistrict desegregation remedy, its significance falls, peculiarly, under the rubric of intradistrict resource disparities.[393] Because its application is confined to a single district, it serves,

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[392] *But see* Levin, *supra* at VIII; some attempts at a fiscally neutral approach, e.g., district power equalizing have resulted in central cities losing education funds while having to pay higher taxes or have resulted in other undesirable results.

[393] Hobson v. Hanson 269 F. Supp 401 (DDC 1967), *aff'd en banc sub nom*, Smuck v. Hobson, 408 F.2d 175 (DC Cir. 1969), Hobson v. Hanson 327 F. Supp 844 (DDC 1971): a detailed history of this litigation appears *infra*.

uniquely, to illustrate the complexities that bedevil easy answers to the more sophisticated interdistrict resource disparity dilemmas. Although it would seem illogical that the district line could be eminent in a one district dispute, the boundary in the factor that allowed the argument over resource equity to be litigable.

In *Hobson v. Hanson* there was no threat to the White pluralistic investment in the maintenance of White student separation nor to sacred political autonomy.[394] According to Kirp and Yudof the court could reach a decision here with ease because it did not assault the widely accepted notions of "a rational justification of inequality based upon the existence of local, interdistrict diversity and the need for autonomy as among local political subdivisions."[395] That the sanctity of pluralism, as manifested in interdistrict diversity and local autonomy, is not questioned in *Hobson*, indeed sets it apart.

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[394] *Id.*

[395] Kirp and Yudof, note 22 *supra* at 575. The court in Hobson v. Hanson 327 F. Supp. 844 distinguished Dandridge v. Williams 397 U.S. 471 (1970), and McInnis v. Shapiro 293 F. Supp. 327 (1968) cited by defendants as cases where disparities in per pupil expenditures existed yet were found to bear a rational relation to governmental administration. The court pointed out that in those cases racial minorities were not treated in a discriminatory way and quoted Hunter v. Ericson 393 U.S. 385 (1969): "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, . . . racial classifications are 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny'. . . . They 'bear a far heavier burden of justification' than other classifications. . . .", 393 U.S. at 391-92. Yudof emphasizes, however, that in those cases judges upheld a statewide educational resource allocation formula which resulted in disparities caused by differences in taxable district wealth. The *Hobson* case is easier because it involves a single district and a request for intradistrict equality only. In granting plaintiffs' request for relief, the court follows what has been the law of the land at least since Plessy v. Ferguson 163 U.S. 537 (1896).

On the other hand, Kirp and Yudof's use of the word "ease" to describe the reaching of a decision is somewhat misleading as the chronological narrative *infra* of the litigation indicates.[396] Perhaps it would be more accurate to say that were it not for the peculiar circumstances of "intra" district disparities in per pupil resource allocation, the research and study that went into the determination of the extent and nature of those disparities and the appropriate suitable remedies would not have been undertaken at all. But here, precisely because of this circumstance, equal protection of the laws guaranteed by the Fourteenth Amendment can automatically be applied.

It is hard to believe the litigation and research related to the *Hobson v. Hanson* series of cases could be so protracted, complicated, and unproductive, when one considers that the ultimate remedy entailed hardly more than the simple reshuffling of one element of the existing resources to dissolve per school and per pupil disparities within one district. The litigation began with a suit initiated by Julius Hobson charging the District of Columbia Board of Education with a variety of constitutional violations in its administration of the national capital's schools. Soon after this filing in 1965, the defendant school board commissioned Columbia University to make a comprehensive study of the schools. The court notes: "The results of this study are reported in a 593-page report entitled Toward Creating a Model Urban School System: A Study of the Washington D.C. Public Schools (September

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[396]The reader should note, also, that *Hobson* is also considered a landmark case on the issue of "tracking," which is omitted here, but discussed *supra* in Chapter III, "Tracks Divide Races."

1967). The volume is popularly known as the *Passow* Report after the study director, Dr. A. Harry Passow."[397]

The trial itself began on July 18, 1966 and continued off and on until October 25 of that year. It was not until July 19, 1967 that trial Judge J. Skelly Wright rendered his (101 page) opinion which incorporated his findings of fact, conclusions of law, and a decree.[398] After the two years of litigation from the original filing and the consideration of a 593-page report commissioned by the defendant--which variously provided aid for both the defendant board and its adversary--Judge Wright noted at the end of his opinion that: "It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government."[399]

In a subsequent action filed in 1969, Carl C. Smuck and Carl F. Hanson attempted to have this decision *supra* set aside, in *Smuck v. Hobson*,[400] contending that the school board should not be "straight-jacketed by an order not rooted in constitutional requirements" or have its freedom curtailed "to exercise its discretion in deciding

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[397] Smuck v. Hobson, 408 F.2d 175 (1969), at 184, n. 44, appeal to the instant case.

[398] Hobson v. Hanson, 269 F. Supp. 401-517, discussed in Smuck v. Hobson, *id.*

[399] Hobson v. Hanson, 269 F. Supp. at 517.

[400] Smuck v. Hobson, 408 F.2d 175.

upon educational policy."[401] The irony of these contentions is indeed striking, when we find that *Smuck v. Hobson* is largely concerned with the unacceptability of the appellants, since the court considers the school board, a non-litigant, the actual "protagonist."[402] Smuck is initiating the suit as an individual member of the board, while Hanson is the resigned superintendent, and no longer represents the district at all. Furthermore, the original appointed board had been superseded by one elected in the fall of 1968.[403] In 1971 Judge Skelly Wright, presiding over still another suit in the *Hobson* saga, opens the new litigation with a scolding demeanor:

> . . . In its 1967 decree, the court attacked *de jure* segregation in the District directly, ordering the track system and optional attendance zones abolished and calling for integration of school faculties. The court held further that per-pupil expenditure is a measure which summarizes most other relevant distribution of educational resources. But on the assumption that *compliance with other items of the 1967 decree would have the secondary effect of equalizing overall* resource distribution, the court deferred any more specific remedy for the inequality in per-pupil expenditures. The thrust of plaintiffs' 1970 amended motion for further relief and enforcement was that this hoped for secondary effect of the original decree has not occurred. Plaintiffs returned to the court asking for further relief in view of the fact that the spread in total expenditures per pupil at various District elementary schools had increased by over 100 per cent since 1964, the last year for which complete figures were available at the time of the original litigation. Plaintiffs requested a more specific remedy to alleviate these inequalities.
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> After a year of discovery and argument by memoranda, the record now before the court indicates that a striking differential in per-pupil expenditures for teachers' salaries and benefits exists between schools east and west of the park and that the differential is greater in fiscal 1971 than it was in fiscal 1970.[404]

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[401] *Id.* at 177.

[402] *Id.* at 176.

[403] *Id.* at 177.

[404] Hobson v. Hanson 327 F. Supp. 844 (DDC 1971).

As a result of the amended motion little more than a reassignment of both more and higher salaried teachers took place to ease the resource disparities, because--as Judge Wright put it:

> The unfortunate if inevitable tendency has been to lose sight of the disadvantaged young students on whose behalf this suit was first brought in an overgrown garden of numbers and charts and jargon like "Standard deviation of the variable," "statistical significance," and "Pearson product moment correlations."
>
> The reports by the experts--one noted economist plus assistants for each side--are less helpful than they might have been for the simple reason that they do not begin from a common data base, they disagree over crucial statistical assumptions, and they reach different conclusions. Having hired their respective experts, the lawyers in this case have a basic responsibility, which they have not completely met, to put the hard core statistical demonstrations into language which serious and concerned laymen could, with effort, understand. Moreover, the studies by both sets of experts are tainted by a vice well known in the statistical trade--data shopping and scanning to reach a preconceived result, and the court had to reject parts of both reports as unreliable because they were biased.
>
> The court has been forced back to its own common sense approach to a problem which, though admittedly complex, has certainly been made more obscure than was necessary. The conclusion I reach is based upon proof, and upon straightforward moral and constitutional arithmetic.[405]

Ray C. Rist and Ronald J. Anson in an article addressing the problem of judicial attempts at running the schools in the face of courtroom disenchantment with social science evidence, conclude:

> Given the reality of the incursion of the courts into policy making in education and the obvious need for information about some very complex questions, the failure of social science to effectively communicate what it knows, as well as to inform when something is not known, will result in a dilution of the effectiveness of judicial decisions in this area. But the inability of actors in education, social science and the judicial process to understand the needs and limitations of the others will just as surely diminish the effectiveness of their contemplated action.[406]

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[405] Hobson v. Hanson, 327 F. Supp. 844 at 859 (1971)..

[406] Ray C. Rist and Ronald J. Anson, *Social Science and the Judicial Process in Education Cases*, J of Law & Educ., 6 at 1.

In his decision in *Smuck v. Hobson* published in January of 1969, Judge Bazelon quoted the Supreme Court in *Green*: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[407] Yet in fiscal 1971 the disparities between resources in the Black and White schools was greater than in fiscal 1970 according to Judge Wright in his introductory remarks of the decision regarding the amended motion.[408] That such protracted activity could exist, however ineffectual, is perhaps best explained again by Judge Bazelon's remark in the *Smuck v. Hobson* segment of the litigation, "The long run solution may lie in a more broadly based school district extending beyond the borders of the District. But such a development is beyond the pale of judicial action."[409] He here underlines the reality of the legal situation, that had this case involved anything other than intra-district disparities, the barrier of local district autonomy would have precluded even these abortive attempts to ease the disparities in resources between the Black and White school children.

The *Hobson v. Hanson* litigation, a curious hybrid racial discrimination case involving intradistrict spending disparities, serves to illustrate the significance of local control because of the case's very lack of this element. It is a case in which financial discrimination is the main question, even though racial separation is

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[407] Green v. County School Board, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

[408] Hobson v. Hanson, 327 F. Supp. 844.

[409] Smuck v. Hobson, 408 F.2d at 186.

blatant.[410] The court's ultimate assignment of a remedy is simplified because it involves re-allocating existing funds within a school district,[411] and thus will not affect either the pocketbooks or autonomy of other districts--or more important not establish a precedent that tampers with the popular political pluralism and healthy local autonomy the Constitution has been interpreted to guarantee in the Tenth Amendment. Actually state legislatures have the power to change school district arrangements, but they, like the courts

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[410] Judge J. Skelly Wright in his opening remarks summarized: The court sought to determine (1) whether the distribution of educational resources favored White over Black students, and (2) if so, whether such discrimination was legally justifiable. A host of inputs was considered: the age, physical condition, and educational adequacy of school buildings; library books and facilities; school congestion; such factors assertedly relevant to assessing faculty quality as teacher experience, faculty education, and reliance on temporary (noncertified) teachers; textbooks and supplies, curricula and special programs; and per-pupil expenditures. In each area, the court identified inequities which favored white students. Predominantly black schools, for example, were filled to 115 percent of capacity, while predominantly white schools had 23 percent of their space unfilled; teachers at white schools were better educated, more experienced, and were more typically certified than their counterparts at black schools. Financial disparities were notable, as the following table, taken from the court's findings of fact, suggest:

Median for schools with % Negro students	
85-100%	$292
67- 85%	$292
33- 67%	$273
15- 33%	$325
0- 15%	$392

[411] Thomas H. Eliot contends that in the area of school governance the problems of financing "are so omnipresent and so grim" that they become "a ceaseless search for funds." Eliot, *Toward an Understanding of School Politics* in Governing Education 3, 19 (A. Rosenthal ed., 1969). In the instant case, no such search was necessary; existing funds were to be reassigned.

hesitate in the face of widespread public opposition.[412] Indeed, a leader in interdistrict funding reform, Arthur Wise, has been forced to concede that, "Local control over schooling is believed to be an operational reality, indeed, a desirable feature of American education," a statement that shows grudging recognition of the delicate balance between funding equity and fiscal federalism.[413] Finally, *Hobson* illustrates how the very impotency of the segregation questions in a school district that is ninety per cent Black can be attributed to the healthy pluralism of local control. Integration is not possible, Judge Bazelon notes, because, "The long run solution may lie in a more broadly based school district extending beyond the borders of the District. But such a development is beyond the pale of judicial action."[414] In other words, when integration is not a viable solution to educational inequalities, the *Plessy v. Ferguson* separate but equal command for equal resources can be resurrected--but that even, rules only in the atypical intradistrict dispute.

Ironically, this funding equality question was decided in Washington D.C., the only American district where budgets are approved by both the city council and the United States Congress, a place where the question of conventional local control is somewhat irrelevant.

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[412] Campbell, note 120 at 48.

[413] Lundquist and Wise, *Developments in Education Litigation: Equal Protection*, *supra* at 1.

[414] Smuck v. Hobson, 408 F.2d 175. At the time of the decision below 90% of the students in District public schools were black. *Id.* at 140. Since then the proportion has increased to 92%. Report of Pupil Membership in Regular Day Schools on October 19, 1967, Office of the Statistical Analyst.

Another curious aspect of the case is that segregation was not a real issue, since only a few schools were predominately White in a system having *de facto* segregation because Black children made up ninety per cent of the total public school enrollment. Not surprisingly the per pupil expenditures had been higher in the White schools and the court asserted that its "duty to scrutinize alleged discrimination against a racial minority is especially high when the right of the minority affected is the right to equality of educational opportunity."[415] This became a statement of a pluralistic right to the collectivist interest of assuring basic academic skills on a dollar basis per student for inputs such as access to facilities and teachers. (The circumstances for the other collectivist component of socialization in the majority values, given the overwhelming ratio of minority pupils, was largely lacking.) Because of the difficulty of computing the proper portions of all resource inputs from confusing social science data,[416] the court decided fairness could best be served by awarding minority students their fair share of teachers' salaries and benefits per pupil by reducing minority class size and reassigning better prepared and experienced teachers from White to Black schools.[417]

Six factors in *Hobson* made it possible to litigate the request for the collectivist interest in spending equality. First, such a request would probably not arise where race is not an issue. If two White schools were involved in such an intradistrict dispute, the

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[415] Hobson v. Hanson.

[416] See note 405 *supra*.

[417] See note 410 *supra*.

district would not have to prove a compelling interest to continue such disparate financing, but only show a rational relation to their governmental policies; almost any excuse would do--traditional teacher allocation procedures or teacher union transfer policies, for example. In fact, the practice in multi-building districts for some faculty to stay in certain choice buildings, others to request transfers to such buildings, and principals to recruit choice teachers to such choice buildings could go unchallenged. The per pupil "teacher" expenditure could vary greatly from building to building in such a system because of teacher location on the salary schedule determined by both seniority and professional preparation. Challenges would be complicated, as they were in *Hobson*, by the educators' contention that teacher seniority is weak as an educational input (in order to preserve present staffing patterns) and at the same time justify present salary schedule arrangements to the tax-paying public.

Second, the court and community could afford to be patronizing, and actually appear to be generous, in meeting the collectivist request for equality in resources necessary for providing the basic educational skills, when the far touchier question of values associated with integration, such as eradicating feelings of racial inferiority, were not at issue.

Third, the remedy that solved the complicated problem of choosing educational inputs to improve outputs (low test scores) in a "fair" dollar and cents way resulted in the simple shifting around of expensive and inexpensive teachers. This is easier and cheaper than shifting old facilities, or the students in them, or

changing pedagogical techniques, or increasing expenditures of instructional input by raising the salaries of the poorly paid teachers to make them "better."[418]

Fourth, the request for "a piece of the action," the collectivistic demand for this equality of opportunity in *Hobson* was easily granted because there was no countervailing threat to pluralistic strongholds.

Fifth, social science evidence was so confusing and conflicting that Judge Wright felt constrained to reject it for the simple solution of dividing up the largest expenditure embodied in the smallest number of units to arrive at a fair per pupil expenditure.[419]

Sixth, arrival at the input definition of equality of educational opportunity became unnecessarily circuitous.[420] But much more difficult, would have been an attempt to calculate an output measure of the definition.[421] *Hobson v. Hanson* thus refined the

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[418] Frank W. Lutz and David J. Edgren, *School Finance: A Critical Look at Pennsylvania's Act 125*, 5 J. L. Educ. 3 (1976), 317. *But see also* Kirp, note 422 *infra*.

[419] See note h *supra*, the citation for Judge Wright's damning remarks regarding social science evidence; also i., Rist and Anson's interpretation of the implication of the Judge's opinion on this issue.

[420] Wise, *supra* note 8 at 155: The equal-dollars-per-pupil definition views education opportunity as a grant by society to the individual, and assumes that there is no reason for society to grant more to one individual than to another. Under this view, society is obliged to grant an equal amount of its scarce educational resources, as measured in dollars, to the education of every individual--which resources and how they are used varied, of course, with the needs of the individual.

[421] Wise, *supra* note 8 at 152: The leveling definition of equality of educational opportunity asserts that resources should be

definition *Brown* gave to equality of educational opportunity under the equal protection clause; it demonstrated that when desegregation is not possible because of a lop-sided minority count within the school district, a recapitulation to the separate but equal standard will take place. Equality of this type will be based on a determination of each child's fair share of existing resources based on an input definition. The teacher expenditure per child can be chosen as the crucial input at the option of the court, especially if evidence for calculating other inputs is unclear. This equality based on inputs amounts to legitimating a claim of a pluralistic group to have an equal dollar and cents opportunity to buy basic academic skills, one of the recognized collectivistic goals of education. Since district boundaries remain inviolate to assure the viability of political pluralism, the question of a claim for the other collectivistic goal of education, socialization, becomes irrelevant.

Ironically, equality of educational opportunity has since been extended to victims of intradistrict resource disparities, but not because of the protracted and abortive struggle fought out in *Hobson*. Kirp explains this development:

> Intradistrict resource disparities, for example, are now largely prohibited by Title I of the Elementary and Secondary Education Act, which provides substantial federal funding for the education of the "educationally disadvantaged." As a condition of eligibility for funds under that act, Congress

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allocated in inverse proportion to students' ability. This definition is based on the assumption that students should, as nearly as possible, leave school with an equal chance of success. Because some students are more able than others, and/or come from home backgrounds which facilitate their education, the schools should attempt to diminish these differences by concentrating on the less-advantaged students.

requires that school districts render state and local expenditures in Title I schools, which are predominantly poor, "comparable" to those in non-Title I schools. This requirement was imposed not to satisfy the concerns for fairness expressed in *Hobson* but to insure that federal moneys were additive rather than equalizing, that poor children received something more than their counterparts in other schools in a given district. And the comparability calculation under Title I differs from the *Hobson* nondiscrimination requirement: the constitutional but not the statutory standard treats salary differentials based on teacher seniority as a resource to be included in the equalization calculation. Yet the comparability requirement of Title I has provided statutory support for, and assured the widespread impact of, the principle of intradistrict equity that received judicial expression in *Hobson*. The statute, not *Hobson*, has given practical meaning to this definition of equal educational opportunity.[422]

Equality and Federalism: Pluralistic Backlash

As has been shown, extentions of equality of educational opportunity, whether concerning discrimination based on race or expenditures per student, has been denied by the Supreme Court where constitutional rights to federalism were at stake. The collective benefits of a financially equalized education have been at odds with political pluralism in more subtle ways as well. Fiscal idealists, themselves so committed to the self-evident fairness of their cause may have misread citizen hopes for both property tax relief and windfalls in state aid instead for commitment to the concept of fiscal neutrality. Nevertheless, there apparently is a limit to the lengths politicians can go to garner votes by promising property tax relief. Even tax-poor citizens will balk--as evidenced by this article appearing in a Minnesota newspaper:

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[422] Kirp, *supra* at 134 citing HEW regulations, 45 C.F.R. § 116.26 (1975).

> A plan sponsored by Sen. William McCutheon, DFL-St. Paul, to have all homeowner property taxes in Minnesota abolished has received a "mixed" reaction at hearings in various parts of the state.
>
> "People who speak for organizations, by that I mean members of a school board, county commissioners, some business groups, feel that the total elimination of the property tax on homes will eliminate local control," McCutcheon added.[423]

Significantly newly appointed Governor Schreiber in neighboring Wisconsin, picked the thirtieth anniversary celebration of the Wisconsin Towns Association (representing over one thousand townships in seventy-two counties) to announce plans for a study he commissioned about the burden of state and local taxes on state citizens. Undoubtedly making the announcement there would tend to allay fears of any connection between tax reform and erosion of local control. The popular press also provides evidence that education costs--independent of the equality issue--have become a popular current concern. In a representative article, equality and finance reform are not the issue; rather, the educational price-tag and the question of who pays the bill are:

> Local school districts have turned increasingly to state governments for help. Nationally, the states' share of the bill for elementary and secondary education rose from 39.7 per cent in 1965 to 43.6 per cent last year. In 18 states that have adopted major education-finance reforms--often prompted by court decisions since 1970--the state share has increased to 51 per cent.[424]

This tendency for the state to pay for a larger share of the bill for education, although initially insulating local district citizens from the reality of rising education costs, is not without its problems.

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[423] Robert J. O'Keefe, *Property Tax Plan Reaction Mixed*, St. Paul Dispatch, Nov. 7, 1977 at 19.

[424] Bill Peterson, *Schools Still on Financial Sick List* (syndicated from the Washington Post), St. Paul Sunday Pioneer Press, Sept. 25, 1977, Sec. 1 at 1, 5.

Whereas school officials formerly had to convince district citizens of the legitimacy of their needs, this money-power shift has created "an annual parade of school officials to state capitals."[425] One reason for this parade is the peculiar phenomenon of the rising costs school districts experience when enrollment decreases. Formerly, high costs were attributed to crowded schools and rising enrollments. Now a school district with one thousand dollars state aid per pupil unit losing five thousand students will suffer a budget loss of five million dollars.[426] With the heavy state input, districts can no longer afford to lose students, a loss which is a common contemporary occurrence. This situation, if corrected, costs the state even more. The correction in new Minnesota legislation now allows districts to spread enrollment declines over three and one-fourth years. "It allows the districts to, in essence, count students who aren't there for 3 1/4 years for purposes of calculating state aid."[427] Since finance reform tends to raise expenditure levels of all but relatively high expenditure districts, the total bill for state educational costs has naturally become greater.[428] Because of this and other rising state governmental costs, John Callahan, director of an

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[425] *Id.* State revenue surpluses were common in the early 70's when equalization acts were initiated; that situation is no longer common, Kirp *supra* at 127.

[426] Bruce R. Nelson, *$15 Million School Aid Bill Favored*, St. Paul Pioneer Press, Mar. 23, 1978 at 2. The state aid per pupil unit in Minnesota was raised from $1,090 in 1977 to $1095 in 1978 according to this article.

[427] *Id.*

[428] *See* Reishauer *supra* at 81.

education finance study for the National Conference of State Legislators, says Money wells in the states are drying up; education is going to have to fight harder and harder each year to get its share of the tax dollar."[429] This may prove to be no easier for school officials than selling tax-poor local citizens on quality education.

As we have seen, the first education finance cases concerned the constitutionality (state) of redistributing funds collected by the state to poor districts. Courts upheld the state. The next round concerned the constitutionality of funding systems which allowed unequal expenditures from district to district. Before *Rodriguez* the plaintiffs usually won and after *Rodriguez* they were as often being reversed. A variety of litigation developing recently is somewhat of a recapitulation to the original type suits. The state is being sued because local taxes for education collected in one district are being used to fund education in another.

Buse v. Smith is such a case.[430] The arguments and issues which evolve serve as a microcosm of new variations in the constant pull between collectivism and pluralism. This case brought before the Wisconsin Supreme Court exemplifies the essential conflict which can develop when state mandated altruism meets head-on with self-serving wealthy districts that are reduced to the "adequacy" *Rodriguez* approved

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[429] *See* Peterson note 424 *supra*. The problem of using the surplus from high expenditure districts for formerly low expenditure districts are discussed *infra*.

[430] Buse v. Smith, 74 Wis. 2d (Dec. 1976).

as meeting constitutional requirements. The Wisconsin equalization act had divided the state into "positive" and "negative" aid districts, the former being recipients of local tax surplus revenues collected from the latter.[431] Plaintiffs complained about the built-in disincentive to spend beyond 110 percent of the state average for the previous year, charging: "If *a negative-aid district spends beyond this level, it will be required to pay more of its revenue to the state.* The obvious aim of this secondary aspect to the formula is to encourage districts to remain close to the median state per pupil spending ceiling."[432] Another variation on the *Rodriguez* theme occurred in the status of the plaintiffs. Both the districts and resident taxpayers and parents initially sued; however, school districts, the court ruled "lacked standing, in declaratory judgment action, to challenge constitutional validity of statutes since districts were political subdivision of state."[433] Ironically, the court--although ultimately ruling for the plaintiffs who questioned the constitutionality of the state equalization plan--cited Coons, Clune, and Sugarman quoting Coleman to support local control:

> While the state's power over education is extensive, there remains some local control.
>
> In the forward to Coons, Clune and Sugarman, *Private Wealth and Public Education* (1970), at p. vii, Professor James S. Coleman described the basic competing forces underlying the development of education in America:
>
> "THE HISTORY OF EDUCATION SINCE the industrial revolution shows

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[431] Sections 121.07 and 121.08, Stats., enacted by ch. 90, Laws of 1973.

[432] Busé v. Smith, 74 Wis. 2d at 558.

[433] *Id.* at 551.

> a continual struggle between two forces; the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children. . . .[434]

The petitioners strengthened their case for district autonomy by pointing out that the school districts actually antedated the state as existing political units.[435] In contrast, the court admonished the state for relying on good intentions: "We understand respondents to suggest that once the constitutional mandate to provide an equal opportunity for education is established, then it must follow that the means chosen by the legislature to accomplish that end, *i.e.*, the school aid formula, is valid. We cannot subscribe to such rationale."[436] Finally, the state was found to be violating its own tax statutes in the operation of its equalization plan:

> Regardless of the merits of the legislative enactments or the worthiness of the cause, we conclude that the state cannot compel one school district to levy and collect a tax for the direct benefit of other school districts, or for the sole benefit of the state. The statutes here under consideration are violative of art. VIII, sec. 1, of the Wisconsin Constitution.[437]

The plaintiffs had been successful in showing the legal differences between various taxes as to purpose and use:

> [9] The parties concede that the state has the power to levy a statewide property tax for the purpose of supporting education, and in fact some form of such tax was in effect in Wisconsin from 1885 until 1933. However, the present

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[434] *Id.* at 571.

[435] *Id.* at 569.

[436] *Id.* at 567. David C. Long, Lawyers Committee for Civil Rights Under the Law, for Wisconsin Education Association was one of several who filed a brief amicus curiae.

[437] *Id.* at 579.

> statutory scheme vests the power of property taxation in local districts, and the taxes which they impose pursuant to this delegated power are local taxes, not state taxes.[438]

During the litigation the court significantly noted that: "[I]t is a fundamental rule that when dealing with the state constitution as contrasted with the federal constitution, *the search is not for a grant of power* to the legislature, but for a restriction thereon.[439] The plaintiffs, however, did not succeed on other grounds. The court rejected the petitioners' argument that negative-aid classification constituted a "deprivation of the due process and equal protection rights of the residents of negative aid districts" although granting that the Wisconsin Constitution guaranteed the fundamental right to equal opportunity for education. Petitioners had argued:

> The strict scrutiny standard should here be applied to the negative-aid classification. Petitioners contend that the negative-aid classification constitutes illegal discrimination against the residents of negative-aid districts in that: (1) The classification ignores the ability to pay of the residents of the negative-aid districts (age, average annual income, etc.); (2) the classification ignored the overburden of other municipal taxes which may exist in negative-aid districts; (3) the classification ignored the cost variations for factors of education, such as transportation, between districts, and (4) the classification creates a strong incentive for taxpayers in negative-aid districts, both consolidated and nonconsolidated, to spend less per pupil than taxpayers in positive-aid districts.[440]

These contentions received short shrift by the court which noted that the classification would survive strict scrutiny since the first three factors applied to both positive and negative-aid districts and the fourth was based, at best, on speculation. However,

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[438] *Id.* at 574.

[439] *Id.* at 564.

[440] *Id.* at 580.

since the equalization law had already been found to violate articles concerning taxing in the Constitution, losing on the equal protection grounds did not matter.

The Wisconsin equalization plan is one incorporating a "recapture provision." This term "refers to a requirement whereby a district must rebate to the state the revenue yield in excess of the state guarantee for a given tax rate or effort."[441] This was the feature of the law at contention which was ultimately held unconstitutional. Regarding this feature Thomas L. Johns commented that earlier pressure from the affected wealthy districts (fifteen to twenty with an estimated three million dollars to be rebated to the state) resulted in a legislative action to delay the effective date of the recapture provision.[442] The Wisconsin example is not an isolated phenomenon. Other states have also experienced problems with equalization provisions of state laws:

> In Maine, the Education Subsidy Commission has recommended that the "recapture" provisions for this local add-on be removed so that wealthy districts will not be penalized under their finance reform. In Florida, on the other hand, poorer school districts have successfully removed the power equalizing add-on in that state's law, contending that they did not benefit at all from that particular reform. Recently a district court decision in Kansas, prompted by complaints from rich districts, overturned that state's district power equalization law. Thus,

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[441] Thomas L. Johns, *1915 School Aid Legislation: A Look at Three States*, 1 J. Educ. Finance 3 (Winter 1976) 397 at 406.

[442] *Id.* At the time of John's study, the recapture provision was not scheduled to become effective until the 1977-78 school year.

> both rich and poor districts in some states are campaigning against the "fiscal neutrality" that is now contained in the new reforms.[443]

Public opinion and recent developments in state litigation would seem to indicate that there is no concensus on the actual meaning of educational equality. Although liberal professionals are committed to the idea of collective equality, laymen are often more concerned about skyrocketing costs in general and losses or gains in equality to one's own children in particular.[444] This appears to be an irresolvable conflict ; given the necessity of realignment of priorities to suit collective versus plural interests, "What is good for the goose is not always good for the gander."

Interstate Inequality: The Federal Role

The definition of equality of educational opportunity in relation to equalizing expenditures per student has been both expanded and constricted by the finance litigation and legislation. But pragmatists and idealists alike have been unsuccessful in forging a distinct meaning into some troubling issues inherent in funding equality. Finance cases and equalization legislation have centered around the input definition, a relatively simple definition only when compared to the output definition. Reformers have favored output definitions based on individual pupil needs maintaining that "one

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[443] Gilbert E. Bursley, *The Political Strategies and Fiscal Ramifications of Educational Finance Reform*, 1 J. Educ. Finance 1, (Summer 1975) 1 at 13.

[444] An additional public concern is the question of the so-called "declining" quality of high cost education (discussed *infra*).

scholar, one dollar" is too simplistic an approach. It appears, however, that until equalization is realized on an input definition, the special needs included in an output definition will be left to other legislation and funding aimed at respective particular needs. This ideal can be stated by reformers in a way that suggests self-evident truth, but is actually based on several debatable value positions:

> A child does not select the place of his birth. He is entitled to the same amount of state-provided education as every other child, *at least within a state*. He is not entitled to more than other children unless he is personally handicapped, disadvantaged, or exceptional. He cannot, nor can his school district, be any "more equal" than another child or another district. (emphasis added)[445]

Besides being based on values not universally held, there is a major inconsistency suggested in the phrase "at least within his own state." Fiscal reformers always stop at the state boundary, yet the argument if it applies at all should apply nationally--a child did not select to have only $523 spent on him in Alabama rather than $1,381 in New York State anymore than he would have selected the lowest spending district in Alabama, $294 per pupil, rather than the "wealthy" Alabama district where $580 was lavished on each pupil. Certainly it is as difficult for his parents to traverse halfway across a continent to a different state as it is for another family to move from one district to another within a state.[446]

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[445] Lucile Musmanns, *Ideological Conflicts in School Finance*, 1 J. Educ. Finance 1, 96 at 96.

[446] The argument that poor people cannot elect to move, as can the more affluent, is often used. Expenditures, Reischauer, *supra* at 66.

Federal equalization theories have been put forth, but the finance reformers themselves are apparently repelled by the problems of constitutionality, increased costs, decreased federalism, politics, and expanded bureaucracy inherent in such proposals.[447] It appears that the federal role for the near future will continue to be categorical in nature, although federal education officials would like to see an expanded role for Washington. A recent panel of former Commissioners of Education listed the following as federal priorities: 1) Creation of a cabinet rank department of education so federal aid and intervention could become both more efficient and effective. 2) More help with desegregation after it is underway, rather than limiting help to initiating desegregation. 3) Phased elimination of funding disparities within and between states. 4) Extension of age groups covered by public education to include day-care, pre-school, and adult schooling. 5) An increase of the federal share to thirty-five per cent of total educational funding. 6) Aid to assure the survival of the "vital" pluralism supplied by parochial and private schools.[448] School superintendents and board members responded negatively to the collective priorities delineated by the federal administrators--citing threats to local control, the negative aspects of the uniformity and indoctrination that could occur in large-scale day care operations, the inconsistency of helping

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[447] *See* Reischauer *supra*; theories regarding federal intervention and policy at 147-75.

[448] *See* note 285 *supra*; Ex-commissioners appearing were: Francis Keppel, 1962-65; Sidney P. Marland, 1970-72; John R. Ottina, 1972-74; Terrel H. Bell, 1974-76.

private schools--since such aid would have the abortive effects of weakening public education and subverting the government's own desegregation policy, and the increased paperwork that invariably accompanies increased federal activity.[449]

The federal role, however, is subject to the whims of politicians in Congress and the White House. President Carter has proposed a bill giving education cabinet rank and increasing federal funds to help the disadvantaged in basic skills. He has also launched a separate urban aid plan in which the most prominent feature is, according to H.U.D. Secretary Patricia Harris, a policy change: "Probably the most important policy change is that all programs and activities of the Federal Government will be examined for their impact on urban areas. That's not sexy. That's not jazzy. But it is very important."[450] Meanwhile, Congress, to pacify tax-weary affluent constituents, was trying to pass a bill providing a tax credit to anyone sending children to private elementary and secondary schools and public or private colleges.[451] Prominent Black leader and columnist Jesse Jackson charged that the Congressional ploy will certainly not improve either public education or the lot of urban residents: "What we may get instead is accelerated deterioration of

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[449]This listing is a summarization of the remarks made by superintendents, other administrators, and school board members in attendance; audience response had been invited at the meeting.

[450]*A Little Bit for Everybody: A New Urban Policy Spreads Its Benefits Thinly*, Time (April 3, 1978) at 13.

[451]Jersie L. Jackson, *Saving Public Education*, St. Paul Sunday Pioneer Press (March 19, 1978) Focus section at 3.

public education and perpetuation of a system that breeds both racism and classism."[452]

President Carter's proposal incited negative comments in the popular press on current educational efficiency: "The reason we pause is that in the past 10 years, according to a national study, per-pupil education costs have risen 132 percent while the Consumer Price Index has risen only 60 percent--and still pupil performance scores have dropped.[453] Yet more of the same is often suggested as a solution by critics:

> If the money that the proposed tax credit or grant-in-aid would make available were used instead to improve public education, the need to provide relief for those paying private school bills would be greatly reduced.
>
> That money and more should be used to resurrect American public education, not to bury it.[454]

This dilemma is best summed up by finance reformer, Betsy Levin; in this summation she gives rise to serious questions regarding funding equity as the key to equality of educational opportunity.

> This last concern is one of the most persistent questions raised in discussions of school finance reform: whether revising a school finance system so that more funds are available to poor school districts will make a difference in the education of the children in those districts. Recent research has cast doubt upon the cost-quality relationship in education. The assumption that money can make a difference, thus militating toward the elimination of wealth-based disparities in per pupil expenditures to meet the national goal of equal educational opportunity, has been severely shaken.[455]

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[452] *Id.*

[453] Nick Thimmesch, *Sending Good Money After Bad*, St. Paul Pioneer Press (Mar. 10, 1978) at 6.

[454] Jackson, note 451 *supra*

[455] *See* Betsy Levin note 8 *supra* at xi.

A syndicated columnist questions the sense of increased spending and also tells the story of a Chicago Black woman, a story which suggests that money is not the answer: [Marva Collins]

> . . . operates a one-room school she founded for intensive teaching of inner-city children.
>
> She puts up with no nonsense, holds pupils only one or two years and raises their overall performance remarkably. She then encourages parents to send their children to parochial rather than public schools.
>
> It's one thing to talk about spending billions more for basic and bilingual education, but it's another to deliver it so pupils can really succeed.
>
> Pupils in bilingual Spanish-English programs aren't learning English any better than those not in this more expensive form of education, according to one federal government study. There is good reason to conclude that school boards and/or administrators install bilingual programs more in response to local political pressure than for their effectiveness.
>
> Indeed, there is a great deal of politicizing in our public education system, especially since the National Education Association (NEA) has become a labor union which spent $3 million on the 1976 election (nearly all on Democratic candidates), backed the Carter-Mondale ticket and expected something nice in return.
>
> It might by cynical, or accurate, to observe that the something nice is the huge hike in federal-aid-to-education Mr. Carter is asking for. Where will the money go?
>
> It's fair to say that labor unions such as the NEA don't like job-performance testing. Rather, they like more job slots, more chummy weekend educational conferences, more "special resource" or "remedial" teachers and, forbid-the-thought, more consultants and studies.
>
> What's really needed is a drastic upgrading in the skills of teachers who now glut the educational field.
>
> We need more good teachers like Marva Collins who notes: "All you need to teach is a blackboard, books and a pair of legs that will last through the day. If you gave me $20,000 worth of audiovisual equipment, I'd leave it out on the sidewalk."[456]

Another news story details the success of "Push for Excellence" a non-financial approach launched in Chicago's ghettos by Jesse Jackson. It involves:

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[456] Thimmesch, note 453 *supra*.

> [E]ducators, parents, community leaders and students themselves.
>
> Jackson's operation preaches a mixture of black pride, positive thinking, self-discipline and educational "back-to-the-basics."
>
> Students are asked to spend at least two hours a night on homework without distractions like radio and television. Parents pledge to make sure their children study. Teachers are asked to assign enough work to keep pupils busy and to notify parents by phone when a student misses school.
>
> Ministers, disc jockeys, sports figures and other community leaders have joined in warning teen-agers of the dangers of drugs, alcohol, premature pregnancies, and promiscuous sex.
>
> "We must demand educational excellence from our youngsters and break the 'dependency syndrome' that is destroying so many of their minds," says the 36-year-old Jackson, a long-time civil rights activist.[457]

The role that the federal government occupies in defining equality of educational opportunity can best be described by Kirp's view of the relationship between courts and law making bodies.

> The primary effect of judicial involvement in defining equal educational opportunity may well lie not in court-defined resolution of these questions, but more nebulously in the judicial impetus for an essentially political solution, with courts affording new legitimacy to particular equity-based concerns. This dynamic interaction does not cease with legislative assumption of responsibility. Statutes are often sufficiently general in their terms to require judicial interpretation; in that sense, court assessment of equity claims is not stayed, but rather placed on a new and more limited footing.[458]

More particularly McCarthy predicts the Supreme Court's direction in this legislative-judicial interplay; this direction suggests the continuance of federal categorical assistance to reach the realization of equality of educational opportunity:

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[457] David Treadwell, *Students Rally, Push for Excellence*, St. Paul Dispatch (Mar. 23, 1978) at 28.

[458] See Kirp note 329 *supra* at 21-22.

> If the Court continues to closely examine classifications which discriminate against individuals on the basis of neutral criteria such as illegitimacy, alienage, race, sex, and other uncontrollable traits relating to a person's status at birth, there are numerous possibilities for educational reform based on equal protection grounds, even if education is *never* declared to be a fundamental interest.[459]

And precisely because of interpretations that education is not a fundamental interest and because federalism is assured by the Tenth Amendment, direct involvement in public education--despite the wishes of bureaucrats--does not appear to be imminent. The requirements of many pluralistic groups in meeting the collective goals of education are increasingly being met by laws and funding aimed at specific groups. Such methods do not threaten local autonomy and hence, traditional power structures, and are thus palatable to majoritarian tastes. This practice appears likely to continue in the immediate future for expanding equality of educational opportunity.

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[459] McCarthy, *What Happened to Equal Protection of the Laws?*, 2 J. Educ. Finance 1 (Summer 1976) 88 at 98.

CHAPTER V

CONCLUSION

Recapitulation

The modern concept of the right to equality of educational opportunity grew out of the *Brown* decision in 1954 which ruled that racial segregation violated a child's right to education on equal terms with the majority. It was almost a decade before litigation began which outlawed racial discrimination sanctioned by law in the South--*de jure* segregation. Northern segregation was later questioned, even though it had not been legislated, since segregation itself came to be viewed as unfair. Thus litigation in the North centered on a finding of state action which condoned or facilitated segregated conditions. At the same time questions other than race assaulted the concept of equality of educational opportunity. If education could not be denied because of race, other groups thought it should not be denied because of sex, the inability to speak English, a low socioeconomic status, the financial disparities between local school districts, or because of physical, mental or emotional handicaps.

As a result of the demands of these groups there is a critical contemporary concern regarding the meaning of the concept of equality of educational opportunity. The present legal interpretation of the term has often been obscured because of the preoccupation with

questions of compliance to the legal extension of the term rather than questions concerning the legal principles behind the remedies imposed. Moreover, the diversity, dispersement, and diffuseness of printed records of both litigation and statutes contribute to this situation. The prolific critical literature on the subject, because of the variety of its foci, often serves to prevent a unified approach, and the subjectivity of this literature serves to hinder an objective and realistic interpretation.

The definitions of equality of educational opportunity usually put forth by racial and financial reformists are based on an ideal of complete integration of races and a level of funding per student not merely equal, but computed in a manner that would make up for any disadvantages in background or ability the individual child may have. Complete integration as an ideal of equality of educational opportunity reflects the significance of the collectivist educational goal of socialization. The ideal of funding equality reflects a belief that moneys purchasing better instruction, equipment, facilities, and supplies will increase achievement of academic skills; however, even funding idealists admit proof of a positive cost-quality relationship has not materialized. Besides achieving the equality inherent in the socialization experience itself, increasing achievement in academic skills is a secondary goal of educational reformists who have sought a mainstream experience for students, since the socio-economic status has correlated with achievement. Although the perceived benefits of meeting the goals have proved somewhat elusive,

access to these collectivisitic goals of socialization and academic achievement has increased.

The reformist literature, generally ignoring the delicate ecology of federalism, reflects a vision of equality as it should be, rather than explaining its definition as presently litigated and legislated. However, viewing developments that have led to the present legal interpretation of the concept of the equality of educational opportunity as manifestations of the two dynamic forces of collectivism and pluralism assist in making the subject more manageable. Therefore, the purpose of this study has been to show the influence of the classic American pull between collectivistic and pluralistic forces on constrictions and extensions of the legal concept of equality of educational opportunity in public education since the Brown decision in 1954.

The study shows that the two collectivistic goals of education to inculcate community norms and to provide minimum academic skills have often been the object of pluralistic interest while the states have often opposed these interests on the grounds of the supremacy of parental choice and local control. This tension reveals a complex series of clashes between competing values of assimilation and of particularism inherent in a federalistic context.

Data for this study has included representative requests reflecting a variety of pluralistic interests in increasing access to equality of educational opportunity which have been drawn from court cases, laws, and also from scholarly literature on the subjects of law, social science and education. The data was organized into

two areas: questions involving remedies for injuries to school children and questions where remedies involving school district boundaries were paramount.

Six elements, whenever they applied, were analyzed to reveal factors reflecting collectivistic or pluralistic interests of the request.

1. The goal of education sought.
2. The relief desired to meet the educational goal.
3. The group opposing the increased access.
4. The competing arguments.
5. The scope of the remedy prescribed.
6. The factors enabling implementation of the remedy.

Generalizations from the Tables

The tables *infra* have been prepared to provide a summary of the requests for equality of educational opportunity made by the pluralistic interests treated in this study. The sixteen requests listed vertically in the tables appear in the order in which they appear in Chapter III and IV *supra*. They are:

South: Intradistrict Desegregation

North: Intradistrict Desegregation

Sex Discrimination

Tracking

Handicapped: Overinclusion

Handicapped: Underinclusion

Language Exclusion

Table 1

Educational Goal

	Collectivistic: Socialization	Collectivistic: Academic Skills	Pluralistic: Retain Diversity	Peripheral Educational Benefits
South: Intradistrict Desegregation	x			
North: Intradistrict Desegregation	x			
Sex Discrimination				x
Tracking	x			
Handicapped: Overinclusion	x			
Handicapped: Underinclusion		x		
Language Exclusion	x	x	x	
Splinter District Desegregation	x			
Metropolitan Desegregation: Intradistrict Violation	x			
Metropolitan Desegregation: Interdistrict Violation	x			
Community Control		x	x	
Interdistrict Funding Equity: Pre-*Rodriguez*		x		
Interdistrict Funding Equity: *Rodriguez*		x		
Interdistrict Funding Equity: Post-*Rodriguez*		x		
Intradistrict Input Remedy		x		
Challenge to State Equalization Recapture Provision		x		

Table 2

Treatment Desired to Meet Goal of Equality

	Mainstream	Alternative	Increased Funds for Quality
South: Intradistrict Desegretation	x		
North: Intradistrict Desegregation	x		
Sex Discrimination			x
Tracking	x		
Handicapped: Overinclusion	x		
Handicapped: Underinclusion		x	
Language Exclusion		x	
Splinter District Desegregation	x		
Metropolitan Desegregation: Intradistrict Violation	x		
Metropolitan Desegregation: Interdistrict Violation	x		
Community Control		x	
Interdistrict Funding Equity: Pre-*Rodriguez*			x
Interdistrict Funding Equity: *Rodriguez*			x
Interdistrict Funding Equity: Post-*Rodriguez*			x
Intradistrict Input Remedy			x
Challenge to State Equalization Recapture Provision			x

Table 3

Pluralistic Group Opposing Extension

	State	Local School District
th: Intradistrict Desegregation		x
th: Intradistrict Desegregation		x
Discrimination		x
king		x
licapped: Overinclusion	x	x
licapped: Underinclusion	x	x
guage Exclusion		x
nter District Desegregation		x
ropolitan Desegregation: ntradistrict Violation	x	
ro.olitan Desegregation: nterdistrict Violation	x	x
munity Control		x
erdistrict Funding Equity: e-*Rodriguez*	x	
erdistrict Funding Equity: *odriguez*	x	
erdistrict Funding Equity: ost-*Rodriguez*	x	
radistrict Input Remedy		x
llenge to State Equalization Recapture Provision	x	

Table 4

Deciding Arguments

	Equal Protection Violation, U.S. Constitution	Violation, State Constitution	Needs Argument	Plaintiffs Dual Membership in Suspect Class (Race)	Priority of Political Pluralism, Tenth Amendment	Federal Law Violation
South: Intradistrict Desegregation	x					
North: Intradistrict Desegregation	x					
Sex Discrimination		x				
Tracking				x		
Handicapped: Overinclusion		x		x		
Handicapped: Underinclusion		x		x		
Language Exclusion						x
Splinter District Desegregation	x					
Metropolitan Desegregation: Intradistrict Violation					x	
Metropolitan Desegregation: Interdistrict Violation	x					
Community Control						
Interdistrict Funding Equity: Pre-*Rodriguez*	x	x	x			
Interdistrict Funding Equity: *Rodriguez*					x	
Interdistrict Funding Equity: Post-*Rodriguez*		x	x			
Intradistric Input Remedy				x		
Challenge to State Equalization Recapture Provision		x			x	

Table 5

Scope of Remedy Prescribed

	Intradistrict	Interdistrict
uth: Intradistrict Desegregation	x	
rth: Intradistrict Desegregation	x	
x Discrimination	x	
acking	x	
ndicapped: Overinclusion	x	
ndicapped: Underinclusion	x	
nguage Exclusion	x	
linter District Desegregation	x	
tropolitan Desegregation: Intradistrict Violation		x
tropolitan Desegregation: Interdistrict Violation		x
mmunity Control	x	
terdistrict Funding Equity: Pre-*Rodriguez*		x
terdistrict Funding Equity: *Rodriguez*		x
terdistrict Funding Equity: Post-*Rodriguez*		x
tradistrict Input Remedy	x	
allenge to State Equalization Recapture Provision		x

Table 6

Major Impetus in Implementation

	Supreme Court	Lower Court	Federal Legislation	Federal Funding	State Legislation	State Funding
South: Intradistrict Desegregation	x					
North: Intradistrict Desegregation	x					
Sex Discrimination		x	x			
Tracking		x				
Handicapped: Overinclusion		x	x	x	x	x
Handicapped: Underinclusion		x	x	x	x	x
Language Exclusion	x		x	x	x	x
Splinter District Desegregation	x					
Metropolitan Desegregation: Intradistrict Violation						
Metropolitan Desegregation: Interdistrict Violation		x				
Community Control						
Interdistrict Funding Equity: Pre-*Rodriguez*		x			x	x
Interdistrict Funding Equity: *Rodriguez*						
Interdistrict Funding Equity: Post-*Rodriguez*		x			x	x
Intradistrict Input Remedy		x		x		
Challenge to State Equalization Recapture Provision		x				

Splinter District Desegregation

Metropolitan Desegregation: Intradistrict Violation

Metropolitan Desegregation: Interdistrict Violation

Community Control

Interdistrict Funding Equity: Pre-*Rodriguez*

Interdistrict Funding Equity: *Rodriguez*

Interdistrict Funding Equity: Post-*Rodriguez*

Intradistrict Input Remedy

Challenge to State Equalization Recapture Provision

The items listed horizontally represent the elements analyzed to reveal factors reflecting collectivistic or pluralistic interests of the request. Certain adaptations from the written data made in the interests of brevity also contribute to the ease of drawing conclusions. Although secondary goals, types of reliefs requested, and methods of implementation are also discussed in Chapters III and IV, only the primary ones are indicated in the table. Likewise, both winning and losing arguments are discussed in the body of the study, while in making this data conform to the requirements of a table only deciding arguments could efficiently be listed; therefore, the two notations for the Supreme Court finding interdistrict desegregation and funding as violations of the Tenth Amendment represent reversals.

Race, Equal Protection, and Socialization

As a result of tabulation of the data, four educational goals were noted, although only two are involved in most requests. Although

all requests reflect a concern for improvement in academic skills, that concern is often not the main thrust of the request itself. Socialization is the main thrust of cases involving segregation and racial discrimination caused by state action and also the tracking and special education requests where students were excluded from the mainstream. Blacks were the particular race covered by the Brown request since statutory dual school systems had been erected for separating that minority group from Whites in the South. *De jure* segregation, later subjected to a broader judicial interpretation, also caused non-statutory segregation of races in the North. The remedy of desegregation is an attempt to meet the collectivist goal of socialization in education. Enrollment in a school with a White majority would also increase tangible factors and a better learning milieu, which in turn would enhance achievement, plaintiffs contended. Blacks were, significantly, involved in the requests for mainstreaming handicapped or those misplaced in low tracks. Of all the educational equality cases, only cases involving the segregation of Black students have prompted the Supreme Court to charge local or state political subdivisions with a violation of the equal protection clause of the Fourteenth Amendment of the federal Constitution.

In desegregation cases each local district was ordered to establish a unitary system within its boundaries, although tax-gathering, distribution of funds, and the state design of political subdivisions were left intact. There was much procrastination and circumvention, but the Supreme Court and lower courts following its lead persisted until the individual district could provide a plan

that worked. Carving up of a district to avoid the full effect of desegregation remedies was proscribed. For instance, the district remained intact, too, when a violation was found in one part of the city of Denver; the partial violation enabled the Supreme Court to order that the whole district be desegregated in a landmark decision.

However, even in the area of race, the Supreme Court stopped at involving other districts in the remedy, unless state action in the form of collusion among districts, interdistrict violation, or adventitious drawing of district lines could be proved. A metropolitan remedy to provide Fourteenth Amendment equal protection in the form of effective socialization was found by the Supreme Court to interfere with the clause in the Tenth Amendment providing for the federalistic organization of the United States stating, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[460] Although the Supreme Court was the major impetus in forcing the issue of desegregation so that the Black students could achieve socialization in majority values, lower courts--in deference to political pluralism--were instructed to oversee the desegregation process carried out by the school district itself. Without the Brown decision it is doubtful that the states would have implemented this remedy, a sharp contrast to the responsibility states have taken in financial equality.

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[460]U.S. Constitution, Amendment X.

Academic Skills, Cost-Quality, and Local Autonomy

The main body of requests for equalization in access to academic skills appear in the contests involving interdistrict funding disparities. Fiscal reformists deplored the system of financing prevalent throughout the country which allowed vast disparities in expenditures per student from district to district within a state. These reformists contend that a student who by geographic accident lives in a school district with a low tax base deserves the same protection as the student discriminated against through accident of race. In *Rodriguez*, it was asserted directly that a class of poor students who typically resided in poor districts should be awarded suspect status since they were being deprived of a fundamental interest--education. The relief the plaintiffs sought however, was not in the form of socialization, but in the form of dollars, so they could buy the kind of education purchased in the wealthy tax-base districts. Although the Supreme Court found no suspect class, no fundamental interest, no absolute deprivation, or no proof that increased funds could produce increased equality--it reversed the original decision primarily because the plaintiffs were asking the Court to order the state of Texas to restructure its system for financing education. Nothing but an interdistrict remedy would cure the Texas expenditures per pupil problem, and as in the interdistrict desegregation cases, the Court would not tamper with state or district autonomy. Although claiming a type of segregation of "poor in poor districts," the *Rodriguez* plaintiffs sought funding equalization, to buy equality in academic skills; they

did not seek the kind of equality gained through socialization--which cannot so easily be graced with a price tag.[461]

Although the equal protection clause of the United States Constitution did not extend to students in poor districts, many state constitutions contained provisions interpreted as mandating some level of spending equality, so plaintiffs often won on those grounds. Legislatures found it politically expedient to lower property taxes and raise the level of the state contribution without threatening local control--whether scholars could find a relationship between cost and quality or not, or arrive at a measure of "needs." Equalization, meaning leveling up in most cases, was popular with hard-pressed districts, and probably gave them more options in local control than they had before. The political resolution through state legislation and funding provided implementation that would in many cases defy judicial resolution. State legislatures have powers of implementation at hand that state courts do not; both state courts and state legislatures have authority to redesign the state and local system of school finance, while the federal Constitution must keep hands off. Likewise, it could be assumed that state courts and legislatures could redesign political subdivisions so desegregation could be realized, but the expedience of such a move would be doubtful.

Another type of case, surfacing since the state equalization acts have been in effect for a time, finds the new state laws to violate certain rights to local autonomy guaranteed by state

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[461] Even though the cost-quality relationship is unresolved, fiscal reformists equate dollars with equal opportunity.

constitutions. In effect, the wealthy school district cited taxing provisions charging that the new equalization law interfered with its right to maintain an unequal advantage over poor districts.[462]

Measuring Equality by Dollars

The difficulties of arriving at a monetary measure of equality became clear in the Hobson case, ~~are~~ limited to intradistrict disparities. There it was not the usual matter of assigning all districts more funds to achieve more equality; rather, the problem was one of dividing the existing budget and arriving at a dollar and cents measure of teacher input, facilities, and equipment expended on each student in each building. Highly paid teachers in some buildings resulted in some students receiving considerably more than their per pupil share of the district budget. After several suits, mountains of social science evidence, and one decision that was one hundred thirty pages long, the court shifted high and low priced teachers around and varied class sizes to arrive at an equal per pupil expenditure. Race was the factor that prompted litigation on the academic skills issue; the socialization goal could not be sought because only ten percent of the students were White. A measure of intradistrict equality has since been achieved through regulations which specify that expenditures on students in Title I schools be comparable to other schools in the district before Title I funds are awarded.

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[462] *See* Busé v. Smith, 74 Wis. 2d 550 *supra*, where the Wisconsin equalization law was found to violate the state constitution's tax provisions, by using taxes in one school district collected in another.

The Handicapped, Twin Goals, and Monumental Implementation

The table shows that the mentally retarded and other handicapped students made and were granted two different kinds of requests for equality for educational opportunity. Some students who were formerly given special treatment and excluded from the mainstream sought the collectivistic goal of socialization. They demanded and won the right to mainstream experience with compensatory help to assure more success there. Severely retarded or handicapped students who could not profit from the education the district had offered, and had therefore been excluded, won the right through lower courts to educational programs designed to fit their special needs, often very costly programs. Relief for both requests has been implemented through state and federal laws accompanied by generous federal funds. These funds for the handicapped have bought support of local districts and increased the demand for teachers in this specialty. Political resolution has provided the opportunity for handicapped students to meet new educational goals; the question of cost-quality to the district is moot, since it does not have to stretch its own budget to cover the expense. As is evident from Table 1 the requests of the handicapped seek two separate educational goals; Table 6 shows that the reformers for the handicapped also employed a variety of forces to implement their sweeping remedies.

Sex Discrimination

Girls as a group have been denied neither of the two collectivistic goals of education--their adjustment to the milieu and

achievement have been notable. Equality in peripheral areas, particularly athletics, has been the main issue in litigation--an equality local districts object to mainly on grounds of cost. Title IX has provided moral support, but no effective financial support has prodded the districts.

Pluralistic Goals: *Lau* and Community Control

The table shows that both the request and the resolution of the problem involving non-English speaking students in *Lau* are unique. The plaintiffs contended that they were excluded from gaining competence in academic skills and an efficient socialization because their inability in English excluded them from effective participation. Their request for bilingual instruction was granted precisely to ease their mastering of academic skills and entry into the English-speaking mainstream, but implementation of bilingual instruction has often had both the purpose and effect of perpetuating cultural differences. The only educational equality case to be affirmed by the Supreme Court that did not concern Black segregation was ruled to violate the Civil Rights laws; the application has been pervasive--supported by federal laws and funding.

Bilingual and bicultural education, together with the Black experiments in community control reflect a desire for pluralistic groups to perpetuate their own values and culture with an accommodation to the mainstream but not a desire to be immersed in its alien culture and values. The majority itself--in both Southern and Northern desegregation cases-have exhibited little interest in helping

pluralistic groups acquire majority values through a socialization experience in public schools. Although political subdivisions have been the main adversary to the groups requesting equality, further cultural pluralism can be expected if minority enclaves gain political control. This portends a new balance of influence in the tension between the forces of collectivism and pluralism, as well as a change of direction for the educational reformists.

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